



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE LAW SCHOOL



Gift of

JUDGE CURTIS D. WILBUR

2001

CALIFORNIA JURISPRUDENCE

A COMPLETE STATEMENT
OF THE LAW AND PRACTICE
OF THE STATE OF
CALIFORNIA

Editor

WILLIAM M. McKINNEY

Editor Ruling Case Law,
Federal Statutes Annotated, Annotated Cases,
Encyclopaedia of Pleading
and Practice, Etc.

VOLUME VI

CONTRACTS TO CORPORATIONS (§ 504)

BANCROFT-WHITNEY COMPANY, SAN FRANCISCO

1922

292233

Copyright 1922

BY

BANCROFT-WHITNEY COMPANY

SAN FRANCISCO
THE FILMER BROTHERS ELECTROTYPE COMPANY
TYPOGRAPHERS AND STEREOTYPERS

TITLES IN THIS VOLUME.

(*Italics indicate cross-reference titles.*)

| | PAGE |
|--------------------------------------|------|
| CONTRACTS | 1 |
| CONTRIBUTION | 497 |
| <i>Contributory Negligence</i> | 524 |
| CONVERSION AND RECONVERSION | 525 |
| <i>Conveyances</i> | 540 |
| <i>Conviction</i> | 540 |
| <i>Convicts</i> | 540 |
| <i>Co-operative Societies</i> | 540 |
| <i>Coparceners</i> | 540 |
| CORONERS | 541 |
| CORPORATIONS | 550 |

CONTRIBUTORS TO THIS VOLUME.

WITH EXPLANATION OF INITIALS SIGNED TO ARTICLES.

| | | |
|----------|---|------------------|
| E. H. R. | EVERETT H. ROAN, | { Contracts. |
| M. C. L. | MATTHEW C. LYNCH, Of the Faculty of the School of Jurisprudence, University of California. | { Contracts. |
| E. W. D. | ELBERT W. DAVIS, | { Corporations.* |

ARTICLES NOT SIGNED.

| | |
|------------------------------|-----------|
| Contribution. | Coroners. |
| Conversion and Reconversion. | |

*The article CORPORATIONS was revised by J. J. Dunne, Esq.,
of the San Francisco bar.

CALIFORNIA JURISPRUDENCE

VOLUME VI

CONTRACTS.

- I. INTRODUCTORY (§§ 1-12).
- II. PARTIES (§§ 13-21).
- III. CONSENT (§§ 22-57).
- IV. LEGALITY OF OBJECT (§§ 58-112).
- V. CONSIDERATION (§§ 113-138).
- VI. MUTUALITY (§§ 139-141).
- VII. DEFINITENESS OR CERTAINTY (§§ 142-146).
- VIII. FORMAL REQUISITES (§§ 147-160).
- IX. INTERPRETATION AND EFFECT (§§ 161-224).
- X. MODIFICATION AND MERGER (§§ 225-229).
- XI. RESCISSION OR ABANDONMENT (§§ 230-236).
- XII. PERFORMANCE AND BREACH (§§ 237-293).

I. Introductory.

- 1. Scope of Article.
- 2. Historical.
- 3. Definitions.
- 4. Receipt as Contract.
- 5. Basis of Contractual Obligation.
- 6. Elements of Contractual Obligation.
- 7. Express and Implied Contracts in General.

Cases are cited in this article to and including 183 Cal., 42 Cal. App. and 200 Pac.

VI Cal. Jur.—1

CONTRACTS.

6 Cal. Jur.

8. Contracts Implied in Law or Quasi Contracts.
9. Services as Basis of Implied Contract.
10. Obligation Arising from Statute as Contract.
- ✓11. Executory and Executed Contracts.
- ✓12. Void and Voidable Contracts.

II. Parties.

13. In General.
14. Persons Non Compos.
15. Infants.
16. Married Women.
17. Husband and Wife.
18. Corporations.
19. Government.
20. Identification.
21. Substitution.

III. Consent.

IN GENERAL—SUFFICIENCY.

22. Necessity and Essentials.
23. Consent Free.
24. Consent Mutual.
25. Communication of Consent.
26. Offer or Proposal.
27. Continuing Offer or Option—General Nature.
28. As Affected by Consideration.
29. Withdrawal or Rejection of Offer.
30. Necessity for, and Effect of, Acceptance.
31. Time for Acceptance.
32. Mode of Acceptance.
33. Agreement to be Reduced to Writing.
34. Conduct Signifying Acceptance.
35. Sufficiency of Acceptance.
36. Unilateral and Bilateral Contracts.

REALITY.

37. Duress and Menace.
38. Resort to Process.

39. Fraud.
40. Undue Influence.
41. Mental Condition.
42. Confidential Relations—Presumption.
43. Application of Rule.
44. Husband and Wife.
45. Remedy in Case of Fraud or Undue Influence.
46. Mistake in General.
47. Materiality of Mistake.
48. Mistake of Fact.
49. Failure of Contract to Express Agreement.
50. Acceptance of Instrument in Ignorance of Contents.
51. Relief from Mistake of Fact.
52. Mistake of Law.
53. When Relieved Against.
54. Mistake as to Legal Effect of Instrument.
55. Misrepresentation of Law as Basis of Mistake.
56. Evidence of Mistake.
57. Ratification or Confirmation of Contract.

IV. Legality of Object.

IN GENERAL.

58. Legality as Element of Contract.
59. Sources of Illegality.
60. Illegal Contracts Distinguished from Contracts Merely Unenforceable.
61. Contracts *Malum in Se* and *Malum Prohibitum* Distinguished.
62. Mode of Performance.
63. Unlawful Intent.
64. Mode of Contracting Prescribed by Statute.

CONTRACTS IN VIOLATION OF STATUTE.

65. In General.
- ✓66. Express or Implied Prohibition.
67. Implication from Imposition of Penalty.
68. Licenses and Permits.
69. Repeal of Prohibitory Law.

CONTRACTS CONTRAVENTING PUBLIC POLICY.

70. What is Public Policy.
71. Attitude of Judiciary.
72. What Contracts are Against Public Policy.
73. Contracts in Fiduciary Capacity.
74. Agreements between Husband and Wife.
75. Agreements for Relief from Liability.
76. Particular Cases.
77. Contracts not to Sue.
78. Waiver of Statutory Protection.
79. Contract Varying Will.
80. Contracts for Services.
81. Assignments of Wages.
82. Contracts Involving Turpitude.

CONTRACTS AFFECTING PUBLIC SERVICE.

83. Agreement to Influence Legislation—General Rule.
84. Lobbying Contracts.
85. Professional Services in Furthering Legislation.
86. Contracts Affecting Compensation of Public Officers.
87. Personal Interest of Public Officer in Contract with Public.

CONTRACTS AFFECTING THE ADMINISTRATION OF JUSTICE.

88. Generally.
89. Ousting Jurisdiction of Court.
90. Procuring Evidence.
91. Suppressing Evidence.

CONTRACTS IN RESTRAINT OF TRADE AND ALIENATION.

92. Development of Doctrine.
93. Statutory Rule.
94. Basis of Rule.
95. Status of Agreement in Restraint of Trade.
96. Agreement Ancillary to Sale of Goodwill.
97. Territorial Extent.
98. Duration.
99. To What Capacities Restraint Extends.

- 100. Agreement Ancillary to Sale of Partnership Interest.
- 101. Agreement Ancillary to Sale of Stockholder's Interest.
- 102. Ancillary Agreement not to Interfere With Patent.
- 103. Restricting Use or Sale of Property.
- 104. Restriction must be Reasonable.

EFFECT OF ILLEGALITY.

- 105. Partial Illegality.
- 106. Enforceability Generally.
- 107. Basis of Rule.
- 108. Parties in *Pari Delicto*.
- 109. Parties not in *Pari Delicto*.
- 110. Enforceability of Promise Growing Out of Illegal Contract.
- 111. Enforceability of Independent Cause of Action.
- 112. Pleading Illegality.

V. Consideration.

IN GENERAL—SUFFICIENCY AND ADEQUACY.

- 113. Definition and Nature.
- 114. Kinds.
- 115. Necessity.
- 116. Sufficiency in General.
- 117. Benefit to Promisor or Detriment to Promisee.
- 118. Relinquishment of Right.
- 119. Forbearance to Sue.
- 120. Compromise of Claim.
- 121. Compromise of Action.
- 122. Performance of Legal Obligation.
- 123. Increased Compensation.
- 124. Moral Obligation.
- 125. Past Benefit or Detriment.
- 126. Agreement Supplementing or Modifying Prior Agreement.
- 127. Promise as Consideration for Promise.
- 128. Adequacy of Amount.

LEGALITY.

- 129. In General.
- 130. Partial Illegality.

RECITAL.

- 131. In General.
- 132. Conclusiveness.

PLEADING AND PROOF.

- 133. Instrument in Writing—Consideration Presumed.
- 134. Presumption Rebuttable.
- 135. Instrument Under Seal.
- 136. Pleading Consideration.
- 137. Want or Failure of Consideration.
- 138. Pleading Want or Failure.

VI. Mutuality.

- 139. Obligation Generally.
- 140. Unilateral Contract.
- 141. Mutuality of Remedy.

VII. Definiteness or Certainty.

- 142. In General.
- 143. Time.
- 144. Price and Quantity.
- 145. Degree of Uncertainty as Affecting Remedy.
- 146. Specifications of Public Improvement.

VIII. Formal Requisites.

- 147. Form as Element.
- 148. Necessity for Writing.
- 149. Agreement to Reduce Contract to Writing.
- 150. Contract Partly Oral and Partly Written—Incomplete Instruments.
- 151. Execution in General.
- 152. Signature.
- 153. Failure of All Parties to Sign.
- 154. Seal.
- 155. Delivery.
- 156. Pleading and Proof of Execution.
- 157. Recording Building Contracts—Rule Prior to 1911.

- 158. Present Rule as to Recording.
- 159. Contractor's Bond.
- 160. Stipulation as to Hours of Labor.

IX. Interpretation and Effect.

GENERAL RULES.

- 161. In General—Code Rules.
- 162. Evidence to Aid.
- ✓ 163. Intention of Parties.
- 164. Nature—Subject Matter—Purpose.
- 165. Construction of Entire Contract.
- 166. Preliminary Negotiations.
- 167. Contemporaneous or Collateral Agreements.
- 168. Construction in Favor of Validity.
- 169. Reasonableness of Construction.
- 170. Language of Instrument.
- 171. Ambiguities.
- 172. Repugnancies.
- 173. General and Particular Provisions.
- ✓ 174. Written and Printed Matter—Figures.
- ✓ 175. Meaning of Words in General.
- 176. Technical Words.
- 177. Abbreviations.
- 178. Particular Words.
- 179. General Words Following Specific Enumeration.
- ✓ 180. Surrounding Circumstances.
- 181. Construing Instruments Together.
- 182. Limitations of Rule.
- 183. Extrinsic Evidence.
- 184. Construction by Parties.
- 185. Construction in Favor of One Party.
- 186. Law as Part of Contract.
- 187. Custom as Part of Contract.
- 188. Express Provisions of Law to Prevail Over Custom or Usage.
- 189. Terms Implied as Part of Contract.
- 190. Matters Annexed to Contract or Referred to Therein.
- 191. Entire and Severable Contracts.

CONTRACTS.

6 Cal. Jur.

- 192. Functions of Courts.
- 193. Relative Functions of Court and Jury.

SUBJECT MATTER.

- 194. In General.
- 195. Liability Under Building and Construction Contracts.
- 196. Contractor's Bond.
- 197. Contracts for Support.
- 198. Transfer of Property.
- 199. Contract in Restraint of Trade.
- 200. Agreement to Pay Sum of Money in Specific Articles.

PARTIES.

- 201. Designation of Parties.
- 202. Contracts in Representative Capacity.
- 203. Relation between Parties.
- 204. Joint and Several Contracts.

TIME AND PLACE.

- 205. Time in General.
- 206. Contract Calling for Performance on Holiday.
- 207. Time not Specified—Reasonable Time Implied.
- 208. Reasonable Time—Question of Law or Fact.
- 209. Reasonable Time in Particular Cases.
- 210. Extension of Time.
- 211. Time as of Essence of Contract.
- 212. Intention of Parties.
- 213. Subject Matter and Surrounding Circumstances.
- 214. Waiver of Requirement.
- 215. Place of Performance.

CONDITIONS.

- 216. Generally.
- 217. Express or Implied.
- 218. Condition Involving Forfeiture.
- 219. Conditions Precedent.
- 220. Conditions Concurrent.
- 221. Conditions Subsequent.

COMPENSATION.

- 222. Right to Compensation Generally.
- 223. Amount or Rate.
- 224. Extra Work.

X. Modification and Merger.

- 225. Modification Generally.
- 226. Oral Modification of Contract in Writing.
- 227. Consideration.
- 228. Effect of Modification.
- 229. Merger.

XI. Rescission or Abandonment.

- 230. Rescission by Mutual Consent.
- 231. Option to Rescind.
- 232. Rescission by One Party.
- 233. Results of Election to Rescind.
- ✓ 234. Grounds for Rescission in General.
- 235. Failure of Consideration.
- 236. Default in Performance.

XII. Performance and Breach.

GENERALLY.

- ✓ 237. Obligation to Perform.
- 238. Alternative Stipulations.
- 239. Performance of Conditions.
- 240. Demand for Performance.
- 241. Tender or Offer—Essentials Generally.
- 242. Conditional Offer.
- 243. Time and Place.
- 244. Production of Thing.
- 245. Defective Tender.
- 246. Waiver of Tender or Offer.
- 247. Effect of Performance.

SUFFICIENCY OF PERFORMANCE.

- 248. In General.
- 249. Performance to Satisfaction of One Party.

- 250. Approval by Third Person.
- 251. Substantial Performance.
- 252. What Constitutes Substantial Performance.
- 253. Partial Performance.
- 254. Destruction of Building in Course of Erection.
- 255. Agreement by Owner to Insure.
- 256. Completion of Work by Owner.
- 257. Waiver of Defects or Objections.
- 258. Acceptance as Waiver.

EXCUSES FOR NONPERFORMANCE.

- 259. In General.
- 260. Prevention Generally.
- 261. Prevention by One Party.
- ✓ 262. Impossibility Generally.
- ✓ 263. Legal Prohibition.
- 264. Act of God or Public Enemy.
- ✓ 265. Destruction or Nonexistence of Subject Matter Generally.
- 266. Destruction of Building Being Erected or Repaired.
- 267. Death.
- 268. Pleading Excuse.

BREACH.

- 269. Generally.
- ✓ 270. Contracts in Restraint of Trade.
- ✓ 271. Prevention of Performance Generally.
- 272. Building and Construction Contracts.
- 273. Anticipatory Breach in General.
- 274. Repudiation.
- 275. Waiver of Breach.

ACTIONS FOR BREACH.

- 276. Remedies in General.
- 277. Contract to Pay in Specific Articles.
- 278. Parties Plaintiff.
- 279. Contract for Benefit of Third Person.
- 280. Intent to Benefit Third Person.
- 281. Enforcement of Contract for Benefit of Third Person by Promisee.

- 282. Parties Defendant.
- 283. Misjoinder or Nonjoinder of Parties.
- 284. Pleading of Contract.
- 285. Pleading and Proof by Plaintiff.
- 286. Variance.
- 287. Defenses.
- 288. Breach as Defense.
- 289. Cross-complaint and Counterclaim.
- 290. Amendments to Pleadings.
- 291. Evidence.
- 292. Findings.
- 293. Action on Contractor's Bond.

I. INTRODUCTORY.

§ 1. **Scope of Article.**—The subject of contracts is so far-reaching and its ramifications are so numerous and minute that it would be impractical to attempt an exhaustive discussion of all its phases in a single article. The scope of the treatment here given is limited to the definitions of the various kinds of contracts and the distinctions between them, and to the principles governing the formation and enforceability of contracts generally, and their interpretation, modification, rescission, performance and breach, particular attention being paid to building and construction contracts entered into between private individuals.¹ In view of the fact that they are considered fully elsewhere, no detailed treatment is here given of what are sometimes called contracts of record;² implied contracts for services rendered;³ particular kinds

1. As to contracts for the construction of public works and improvements, see BRIDGES; COUNTIES; HIGHWAYS; MUNICIPAL CORPORATIONS; STATE OF CALIFORNIA. And for a discussion of contracts for sinking wells, see OIL; WATERS.

2. See JUDGMENT.

3. See ASSUMPSIT, vol. 3, p. 372; INDEPENDENT CONTRACTORS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; WORK AND LABOR.

of express contracts,⁴ or instruments;⁵ contracts by particular classes of persons,⁶ or aggregations of persons,⁷ or private and public corporations,⁸ or governments;⁹ contracts incident to particular occupations;¹⁰ contracts by persons standing in special relations to each other;¹¹ or contracts affecting particular kinds of property.¹² From this article are excluded also decisions dealing with some of the formalities incident to the execution of particular contracts,¹³ some of the grounds of illegality,¹⁴ the question of what contracts are assignable,¹⁵ as well as the question by what law a contract is governed.¹⁶ Likewise there are treated elsewhere the principles relating to the abrogation or modification of contracts by judicial decree,¹⁷ the un-

4. See ACCORD AND SATISFACTION, vol. 1, p. 124; APPRENTICESHIP, vol. 3, p. 22; ARBITRATION AND AWARD, vol. 3, p. 27; AUCTIONS, vol. 3, p. 755; BAILMENTS, vol. 4, p. 1; BONDS, vol. 4, p. 350; BOUNTIES, vol. 4, p. 448; CHATTEL MORTGAGES; COVENANTS; CROPS; EXCHANGE OF PROPERTY; GAMING; GUARANTY; INDEMNITY; LANDLORD AND TENANT; NOVATION; SURETYSHIP; RELEASE; REWARDS; SALES; SUBSCRIPTIONS; TREATIES; VENDOR AND PURCHASER; WILLS.

5. See CHATTEL MORTGAGES; DEEDS; MORTGAGES; NEGOTIABLE INSTRUMENTS.

6. See EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INFANTS; INSANE PERSONS; PUBLIC OFFICERS.

7. See ASSOCIATIONS, vol. 3, p. 345; JOINT ADVENTURES.

8. See CORPORATIONS; COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS; TOWNSHIPS; UNIVERSITIES AND COLLEGES.

9. See PUBLIC SECURITIES; STATE OF CALIFORNIA; UNITED STATES.

10. See ARCHITECTS, vol. 3, p. 95; ATTORNEYS AT LAW, vol. 3, p. 576;

BANKS, vol. 4, p. 92; BROKERS, vol. 4, p. 545; CARRIERS, vol. 4, p. 809; INNKEEPERS; INSURANCE; LOGS AND TIMBER; PHYSICIANS AND SURGEONS; RAILROADS; STREET RAILWAYS; TELEGRAPHS AND TELEPHONES; THEATERS, SHOWS, AND PUBLIC RESORTS; WAREHOUSES.

11. See AGENCY, vol. 1, p. 683; BROKERS, vol. 4, p. 545; COMPOSITION WITH CREDITORS; GUARDIAN AND WARD; HUSBAND AND WIFE; PARENT AND CHILD; TRUSTS.

12. EASEMENTS; FENCES; FIXTURES; FRANCHISES; GOODWILL; OIL; PARTY-WALLS; PATENTS; WAREHOUSES; WHARVES; WATERS.

13. See ACKNOWLEDGMENT, vol. 1, p. 218; RECORDS; FRAUDS, STATUTE OF.

14. See CHAMPERTY AND MAINTENANCE, vol. 4, p. 1120; GAMING; HOLIDAYS; MONOPOLIES AND COMBINATIONS; SUNDAY; USURY.

15. See ASSIGNMENTS, vol. 3, p. 230.

16. See CONFLICT OF LAWS, and the references there given.

17. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 756; REFORMATION OF INSTRUMENTS.

authorized alteration of instruments,¹⁸ and certain principles of law and special remedies available to the parties in actions for the enforcement of contracts or rights arising thereunder.¹⁹ The right to maintain an action for interference with contract relations also is considered under other titles.²⁰

§ 2. Historical.—Some doubt may be expressed as to just what system of law governed the making and validity of contracts in California at the time of its acquisition by the United States. The situation, however, has been briefly summarized in the following language: "When the territory now comprised in the state of California was under Mexican dominion, its judicial system was that of the Roman law, modified by Spanish and Mexican legislation. Upon the formation of the present state government, that system was ordained by a constitutional provision to be continued, until it should be changed by the legislature. At the first session of the legislature an act was passed, adopting the common law of England.¹ And on the 22d of April, 1850, another act was passed, repealing all the laws previously in force, but providing that no right acquired, contracts made, or suits pending shall be affected thereby. It must, therefore, be considered beyond dispute, that all contracts made here before the 22d of April, 1850, must have their effect and construction by the rules of the civil law."²

18. See ALTERATION OF INSTRUMENTS, vol. 1, p. 1064.

19. ASSUMPSIT, vol. 3, p. 372; ATTACHMENT, vol. 3, p. 397; BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 455; CONTRIBUTION; DAMAGES; ESTOPPEL; FORFEITURES; INJUNCTION; LIENS; LIMITATION OF ACTIONS; MECHANICS' LIENS; SPECIFIC PERFORMANCE.

20. See LABOR; ~~MASTER AND SERVANT~~; ^{INTERFERENCE;} ~~TORTS.~~

1. See COMMON LAW.

2. Fowler v. Smith, 2 Cal. 568, affirming 2 Cal. 39. And, supporting these views, see Wells v. Stout, 9 Cal. 479. But see Panaud v. Jones, 1 Cal. 488, in which the court, in passing upon the validity of a will, said: "I am of the opinion that the will . . . was a valid will, when tested by the strict rules of the Mexican or Spanish law. I speak of Mexican and Spanish law, and not of the laws of Justinian, nor of the doctrines of commenta-

(See "Graham",
1926 Supp. 4-17)

With the adoption in 1872 of the codes many of the common-law principles governing contracts became a part of the statutory law of the state. Such rules are applicable to contracts executed prior to the codification and after the adoption of the common-law system in California as fully as to those contracts executed since the adoption of the codes.³ Where the codes are silent the common law still governs, "so far as it is not repugnant to, or inconsistent with, the constitution of the United States, or the constitution or laws of this state."⁴ Needless to say, the codes establish the law in so far as it departs from the common law.⁵

In spite of the formal adoption of the common law, some of the principles governing contracts under the civil law have persisted, and a few have been incorporated into the

tors, ancient or modern, on the civil code of Rome; for that code, save so far as it has been expressly adopted by the legislative power, is without authority in Spanish countries. The jealousy manifested towards the introduction of the civil law into Spain in the early ages of the Spanish monarchy was so great, that even the reading of it was prohibited under the most severe penalties. . . . And a modern author of high authority uses the following language: "The civil laws are not, and should not be, denominated laws in Spain, but opinions of the wise to be followed only where the laws are deficient, and where they are not inconsistent with the law of nature or the laws of the country; which latter, and not the Roman law, are properly speaking the common law; and neither the Roman law, nor any other foreign law, ought to be used or observed, . . ."

And see article entitled "Legal and Political Development of the

Pacific Coast States," by Orrin K. McMurray, Professor of Law, University of California, appearing in the publication, "Nature and Science on the Pacific Coast," in which the statement was made that "The Spanish-Mexican law theoretically governed the civil rights of all persons in California from the conquest in 1846 until the formal adoption of the common law of England in 1850."

As bearing on this subject, see, also, INTRODUCTION to this work by Judge Wm. W. Morrow, vol. 1, p. xi; and a note, 8 California Law Review, 67, "The Acquisition of California." See, also, COMMON LAW.

3. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

4. Pol. Code, § 4468. See COMMON LAW.

5. Peters v. Peters, 156 Cal. 32, 23 L. R. A. (N. S.) 699, 103 Pac. 219; Estate of Apple, 66 Cal. 432, 6 Pac. 7; Siminoff v. Jas. H. Goodman & Co. Bank, 18 Cal. App. 5, 121 Pac. 939.

codes. The civil law, as a system, is so variant from the common law, and having its manifest influence upon the forms and modes of making contracts, makes it often difficult to discover a rule which is at all cognate to a well-understood one of the common law. Instead of following an unbending rule which disregards material clashing circumstances, each case was determined according to its own facts, by those principles which every system would admit to be the immutable laws of right and wrong.⁶

§ 3. Definitions.—Although the several chapters of the Civil Code concerning contracts form a distinct part of the division devoted to “Obligations,” the code itself provides that contract is one of the sources of obligation, and, indeed, so links the rules governing obligations generally with those controlling obligations arising from contract, that a discussion of the latter involves a consideration of the former. The code defines an obligation to be “a legal duty, by which a person is bound to do or not to do a certain thing.” An obligation may arise “either from the contract of the parties, or by operation of law,” in which latter case it “may be enforced in the manner provided by law, or by civil action or proceedings.”⁷

“A contract is an agreement to do or not to do a certain thing.”⁸ “It is the meeting of minds upon and agreement to a definite thing.”⁹ Or, as it has been judicially defined by an incorporation into the definition of some of the elements required by law to make a promise

6. *Holliday v. West*, 6 Cal. 519.

7. Civ. Code, §§ 1427, 1428; *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856; *Siminoff v. Jas. H. Goodman & Co. Bank*, 18 Cal. App. 5, 121 Pac. 939. Obligations arising by operation of law are treated under other titles, as for example, FRAUD AND DECEIT; NEGLIGENCE; TORTS. See *infra*, § 8, as to quasi contracts.

8. Civ. Code, § 1549; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720.

9. *Loma Prieta Lumber Co. v. Hinton*, 12 Cal. App. 766, 103 Pac. 528. See *infra*, § 24, as to meeting of minds as essential of consent.

enforceable, "A contract is a voluntary and lawful agreement, by competent parties for a good consideration, to do or not to do a specified thing." The only end and object of a contract is the doing or not doing the particular thing mentioned, and the obligation of the contract is the vital binding element that secures this practical consummation.¹⁰

An agreement is not the less a contract because it merely provides for, or is in advance of, another contract; than if it were incorporated in the ultimate contract; or, in other words, one may as well bind himself to make a contract, as bind himself by contract, and the first as well partakes of the nature and essentials of a valid agreement as the latter.¹¹ Nor does the fact that an obligation is the outgrowth of the commission of a tort prevent its being contractual. A tort liability may be converted into a contract by a promise, as where an agreement is made to pay a stated sum of money in full satisfaction of damages resulting from the tort.¹² But a mere moral obligation is not enforceable either at law or in equity.¹³ It has been held that the gift of a donor's own promissory note, either inter vivos or in view of death, does not create an enforceable obligation in favor of the donee.¹⁴ However, if a donor by promises induces the donee to change his position to his detriment, after the change is made the donor can be compelled to make

10. *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638. For further definitions of obligation of contracts, see CONSTITUTIONAL LAW, vol. 5, p. 759 et seq. See *infra*, § 5, as to basis of contractual obligation.

11. *De Rutte v. Muldrow*, 16 Cal. 505; *Noyes v. Schlegel*, 9 Cal. App. 516, 99 Pac. 726. As to subsequent reduction of agreements to writing, see *infra*, § 33.

12. *Poly v. Williams*, 101 Cal. 648, 36 Pac. 102; *Dunton v. Niles*, 95 Cal. 494, 30 Pac. 762. As to

wrongs both in contract and tort and the waiver of tort and suing in *assumpsit*, see ACTIONS, vol. 1, pp. 321, 322; ASSUMPSIT, vol. 3, p. 372.

13. *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Becker v. Schwerdtle*, 6 Cal. App. 462, 92 Pac. 398. See *infra*, § 124, as to moral obligation as consideration for promise.

14. *Tracy v. Alvord*, 118 Cal. 654, 50 Pac. 757.

his promise good; the relation between them becomes then one of contract.¹⁵

§ 4. Receipt as Contract.—Generally, a receipt is not regarded as a contract, and hardly as an instrument at all; it has but little more force than the oral admission of the party receiving.¹⁶ However, writings which are receipts, but which also contain contractual terms, have been held to be written contracts, where either they purport to be, or the evidence shows that they are, the written memorial of the full understanding between the parties. Of this character is usually a bill of lading issued by a carrier acknowledging the receipt of the goods to be transported and specifying the terms of the transportation.¹⁷ Clearly, though, a receipt is insufficient to establish a contract for the purchase and sale of real property where the description was not originally contained therein, but was subsequently inserted by the vendee in the absence of the vendor.¹⁸

A railroad ticket is in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules, and is not a contract expressing all the conditions and limitations usually contained in a written agreement, the contract itself being implied by law. In consequence, it has been held, parol evidence is admissible to show the elements of the contract, in so far as it does not conflict with such of the terms as are expressed in the ticket.¹⁹

15. *Burris v. Landers*, 114 Cal. 310, 46 Pac. 162. See *GIFTS*.

16. *Brannan v. Mesick*, 10 Cal. 95.

17. *Lawrence v. Premier Indemnity Assurance Co.*, 180 Cal. 688, 182 Pac. 431. See *CARRIERS*, vol. 4, p. 851 et seq.

18. *Honore v. Lemm*, 181 Cal. 420, 184 Pac. 664. See *VENDOR AND PURCHASER*.

19. *Ames v. Southern Pacific Co.*, 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 310. See *CARRIERS*, vol. 4, pp. 914, 915.

A receipt should be distinguished from a release in writing which extinguishes an obligation with or without consideration.²⁰ This promise of release being binding when in writing and needing no consideration seems to be a survivor from the early common-law doctrines on sealed instruments. The code provision as to consideration applies only to formal releases and not to documents which operate as releases in a roundabout way.¹ A release obtained by fraud does not, of course, bar further action on the claim.²

§ 5. Basis of Contractual Obligation.—A contract, though it may be based on consent of the parties, derives its obligatory force from the sanction of the law.³ The obligation does not, properly speaking, inhere or subsist in the agreement *ex proprio vigore*, but in the law applicable to the agreement, that is, in the act of the law in binding the promisor to perform his promise. This basic principle has been enunciated by the supreme court of the United States in the following language: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the

20. Civil Code, § 1541.

1. Upper San Joaquin Canal Co. v. Roach, 78 Cal. 552, 21 Pac. 304; Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648.

2. Meyer v. Haas, 126 Cal. 560,

58 Pac. 1042. See RELEASE.

3. Scheeline v. Pezzola, 29 Cal. App. 266, 155 Pac. 127 (quoting Ruling Case Law).

other a right to enforce the performance by the remedies then in force.”⁴

The law which governs with respect to the obligation of a contract is, as a general proposition, dependent upon the intention of the parties, expressed or presumed. On the other hand, matters that relate to the preliminary question whether a contract has been made are in general governed by a fixed law, which is independent of and cannot be varied by the intention of the parties. Such matters include the capacity of the parties to contract, conditions or restrictions upon the right to contract, and the formal validity of the contract.⁵

§ 6. Elements of Contractual Obligation.—Although the Civil Code defines a contract as an “agreement to do or not to do a certain thing,” it is obvious that not all agreements or promises are contracts, in the sense that they are enforceable. There are certain essential elements, the presence or absence of which determines the existence of the contractual obligation. Section 1550 of the Civil Code provides that

“It is essential to the existence of a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration.”⁶

For the purposes of our article, this analysis is adopted. Mutuality and definiteness or certainty are sometimes

4. *McCracken v. Hayward*, 2 How. (U. S.) 608, 11 L. Ed. 397, see, also, *Rose's U. S. Notes*, per Baldwin, J. And see *People v. Brooks*, 16 Cal. 11 (quoting and applying this rule). See *infra*, § 186, as to law as part of contract.

As to impairment of the obligations of contracts, see *CONSTITUTIONAL LAW*, vol. 5, p. 759 et seq.

5. *Flittner v. Equitable Life Assur. Soc.*, 80 Cal. App. 209, 157 Pac. 630. See *CONFLICT OF LAWS*, vol. 5, p. 449 et seq.

As to interpretation of contracts according to the intent of the parties, see *infra*, § 163 et seq.

6. *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707; *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344 (holding that the instrument in question contained, although imperfectly expressed, all the elements of a contract as required by section 1550 of the Civil Code).

treated as essential elements of an enforceable contract, and are also considered herein.

§ 7. Express and Implied Contracts in General.—Contracts, from an evidentiary standpoint, are ordinarily divided into three classes—express, implied in fact, and implied in law or quasi contracts⁷—the manner in which the element of consent is supplied being determinative of the question as to whether a contract is express or implied.⁸ “An express contract is one the terms of which are stated in words,”⁹ oral or written.¹⁰ A contract implied in fact is one “the existence and terms of which are manifested by conduct.”¹¹ Both express contracts and contracts implied in fact are founded upon an ascertained agreement, or, in other words, are consensual in nature,¹² the substantial difference between the two being in the mode of proof by which they are to be respectively established.¹³ The former must be proved by an ascertained and expressed agreement between the parties, while in case of the latter the law implies that the party did make such an agreement as under the circumstances disclosed he ought in fairness to have made;¹⁴ and, in the latter case, it is unnecessary to aver the promise.¹⁵ Thus

7. See *infra*, § 8, as to contracts implied in law. As to liability on and recovery under implied contracts, see *ASSUMPSIT*, vol. 3, p. 372; *MONEY LENT*; *MONEY PAID*; *MONEY RECEIVED*; *WORK, LABOR AND MATERIALS*.

8. See Civ. Code, § 1619, providing: “A contract is either express or implied.”

9. Civ. Code, § 1620.

10. *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054.

11. Civ. Code, § 1621; *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852; *Friermuth v. Friermuth*, 46 Cal. 42; *Northern Assurance Co. v. Stout*, 16 Cal. App. 548, 117 Pac. 617.

12. *Rebman v. San Gabriel Valley Land & W. Co.*, 95 Cal. 390, 30 Pac. 564 (overruled on another point by *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391); *Smith v. Moynihan*, 44 Cal. 53; *Northern Assurance Co. v. Stout*, 16 Cal. App. 548, 117 Pac. 617.

13. *Smith v. Moynihan*, 44 Cal. 53.

14. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Smith v. Moynihan*, 44 Cal. 53.

15. *Kraner v. Halsey*, 82 Cal. 209, 22 Pac. 1137. See *ASSUMPSIT*, vol. 3, p. 372.

the allegation of an advance, upon a mutual agreement of one to take and pay for property for another in his own name, implies an agreement upon the part of the beneficiary of such payment to reimburse the one who made the advancement.¹⁶ And from an acknowledgment of a debt due the law implies a promise to pay.¹⁷ In fact, when a promise is alleged in a pleading, it must be held to be express,¹⁸ and where an express contract is averred none will be implied.¹⁹ But before the court can say that an express contract is proven, there must be something more than the deductions or conclusions of the witness from the words used; it must be shown that all the essential elements of a contract are present.²⁰ A promise will not be inferred where an express promise would be contrary to law. The law never implies an agreement against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to do.¹

§ 8. Contracts Implied in Law or Quasi Contracts.—

There are many cases, under the common law, where assumpsit is allowed although there was in fact no contract made, nor any dealings whatever between the parties, the law implying a contract out of necessity, and because without such fictitious creation none of the legal forms of action would apply and the party would be remediless.² Such contracts are variously designated as contracts implied in law, quasi, or constructive contracts. Thus, if a party obtains the money of another by mistake, it is his duty to refund it, not from any agreement on his part, but

16. *Semi-Tropic Spiritualists' Assn. v. Johnson*, 163 Cal. 639, 126 Pac. 488. See *TRUSTS*.

17. *Merchants' Nat. Bank v. Carmichael*, 178 Cal. 446, 173 Pac. 999.

18. *Poly v. Williams*, 101 Cal. 648, 36 Pac. 102.

19. *Van Valkenburg v. McCauley*, 53 Cal. 706.

20. *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054.

1. *Zottman v. San Francisco*, 20 Cal. 96. See *infra*, §§ 58-112.

2. *National Pac. Oil Co. v. Watson*, 60 Cal. Dec. 495, 193 Pac. 133 (sale of land); *County of San Luis Obispo v. Gage*, 139 Cal. 398, 73 Pac. 174. See *ASSUMPSIT*, vol. 3, p. 372.

from the general obligation to do justice which rests upon all persons. In such case the party makes no promise on the subject, but the law, "consulting the interests of morality," implies one, and the liability thus arising is said to be a liability upon an implied contract.³ But such an obligation, although contractual in the sense that it is remediable by *assumpsit*, lacks the element of consent, which is an essential ingredient of an actual contract. The law imposes the obligation quite irrespective of the intention of the parties. It necessarily follows that the law governing ordinary contracts resting in the volition of the parties thereto have no application.⁴ Quasi contracts are not favored and are declared only when "principles of natural equity" or the law itself produces the obligation.⁵

The courts of California have shown some disposition to disregard the distinction between quasi contracts and consensual contracts.⁶ A conspicuous example of this is presented in the case of judgments. While the obligation arising from a judgment is considered in some jurisdictions to be quasi contractual in nature, it has been declared by the California supreme court that suits upon judgments are actions upon contracts.⁷

3. *Argenti v. San Francisco*, 16 Cal. 255 (cited as authority for this proposition in *Pacific Mail S. S. Co. v. Joliffe*, 69 U. S. (2 Wall.) 450, 17 L. Ed. 805, see, also, *Rose's U. S. Notes*). See *Fitzhugh v. University Realty Co.*, 31 Cal. App. Dec. 536, 188 Pac. 1023, and *Fontaine v. Lacassie*, 36 Cal. App. 175, 171 Pac. 812, to the effect that the rescission of a contract by one party for good cause gives rise to a quasi-contractual right of recovery, by the rescinding party, of the benefits conferred by him upon the other party. See, also, **MONEY RECEIVED**.

4. *Capital Gas Co. v. Young*, 109 Cal. 140, 29 L. R. A. 463, 41 Pac.

869 (action to recover for gas furnished city).

5. *Willeox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913C, 1392, 123 Pac. 276 (holding no quasi contract arose).

6. *De Celis v. Porter*, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120; *S. C. V. Peat Fuel Co. v. Tuck*, 53 Cal. 304. And see article in 2 *California Law Review*, p. 171, distinguishing contracts and quasi contracts.

7. *Bean v. Loryea*, 81 Cal. 151, 22 Pac. 513 (and cases cited); *Scarborough v. Dugan*, 10 Cal. 305. But see *Larrabee v. Baldwin*, 35 Cal. 155 (holding a judgment rendered against a corporation, while

§ 9. Services as Basis of Implied Contract.—Not infrequently a contract implied in fact has its basis in benefits received by way of services performed. An action on an implied contract lies to recover for services performed where there has been an express contract which is unenforceable for failure to comply with formal requirements,⁸ or which has been deviated from.⁹ And even in the absence of an express contract originally, where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied.¹⁰ Of course all the circumstances actually surrounding the parties in the particular transactions are to be carefully considered before this implication of a promise is to be indulged. And it must appear that the services were actually rendered to the one it is sought to hold liable.¹¹ Moreover, the person receiving the services of another must have been in a situation in which he was entirely free to elect whether he would accept the work, and the election must have influenced the conduct of the party with reference to the work.¹² After a property owner has protested against street work, a promise to pay for it cannot be implied from the fact that he saw the work done without further objection, and made suggestions to the workmen as to the proper way of doing it.¹³

a party is a stockholder, upon a contract entered into before the relation of stockholder existed, is not a contract within the meaning of an act making such stockholder liable for the corporate debts contracted while he was such stockholder. See CORPORATIONS). See, also, JUDGMENT.

8. Zellner v. Wassman, 60 Cal. Dec. 428, 193 Pac. 84; Rutherford v. Peppas, 35 Cal. App. Dec. 496, 199 Pac. 1111. See infra, §§ 12, 68.

9. De Boom v. Priestly, 1 Cal. 206. See WORK AND LABOR.

10. Semi-Tropic Spiritualists' Assn. v. Johnson, 163 Cal. 639, 126 Pac. 488; Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130; Pixley v. Western Pac. R. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

11. Smith v. Moynihan, 44 Cal. 53.

12. Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

13. Nagle v. McMurray, 84 Cal. 539, 24 Pac. 107.

An inferior political body, such as a municipal corporation or school board may, under some circumstances, be held liable upon an implied contract for benefits received by it, but this rule of implied liability is applied only in those cases where the board or municipality is given the general power to contract with reference to a subject matter, and the express contract which it has assumed to enter into in pursuance of this general power is rendered invalid for some mere irregularity or some invalidity in the execution thereof, and where the form or manner of entering into the contract is not violative of any statutory restriction upon the general power of the governing body to contract nor violative of public policy. Where the statute prescribes the only mode by which the power to contract may be exercised the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application in such cases.¹⁴

§ 10. Obligation Arising from Statute as Contract.—

It may be conceded that there are obligations arising by operation of law which do not also come within the class of obligations arising from contract; but it must also be admitted that there are obligations which, in a certain sense, arise from the operation of law, and at the same time are in substance and effect contracts—that there are liabilities which although arising from statute may nevertheless be contracts. Contracts may be made or evidenced by a statute, and by conduct ensuing thereupon, as well as by other means or evidence. The statute itself, coupled with the subsequent performance of the conditions, furnishes all the elements which are necessary to the formation and existence of an implied contract. There is a clear distinction between such a case and one in which an implied contract is raised by the law out of pure

14. *Reams v. Cooley*, 171 Cal. 150, See COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS.
Ann. Cas. 1917A, 1260, 152 Pac. 293.

necessity and merely to provide a remedy.¹⁵ Thus, liability of one coterminous owner to the other, under section 841 of the Civil Code, for one-half the value of a division fence built by the latter, which the former uses as a part of his inclosure, is not a statutory liability, but is rather a liability upon an implied contract.¹⁶ Similarly it seems to be generally understood that an action against a stockholder for his proportion of the debt of a corporation of which he is a member is upon a contract, although under the provisions of section 3 of article XII of the constitution and section 322 of the Civil Code the stockholder is made liable to perform the contract in part.¹⁷ The liability of a stockholder to the corporation on an assessment is a liability arising from contract.¹⁸ A street assessment is a contract, and the bond issued upon such assessment, by reason of the failure of the owner to pay the same within the time allowed to the contractor for the work to collect the same must therefore also constitute a contract—a contract forced upon the parties by the compulsion of law enacted in pursuance of the taxing power of

15. *County of San Luis Obispo v. Gage*, 139 Cal. 398, 73 Pac. 174, per Shaw, J. See *supra*, § 8, as to contracts implied in law.

16. *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029. See FENCES.

17. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846 (construing section 537 of the Code of Civil Procedure relative to attachment); *Dennis v. Superior Court*, 91 Cal. 548, 27 Pac. 1081 (construing section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in

actions arising upon contract for the recovery of money, when the amount claimed is less than three hundred dollars); *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691; *Miller & Lux v. Katz*, 10 Cal. App. 576, 102 Pac. 946. But see *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335 (and cases cited), and *King v. Armstrong*, 9 Cal. App. 368, 99 Pac. 527 (holding that such liability is one created by law within the meaning of section 359 of the Code of Civil Procedure relative to the limitation of actions). See CORPORATIONS.

18. *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244. See CORPORATIONS.

the state.¹⁹ The proposal and offer to issue bonds of certain kind by a school district as authorized by statute, and the purchase thereof, is a contract in which the taxpayer is one party and the bond purchaser the other.²⁰ The state, by the act of 1880, in effect promised to each county that if it should thereafter maintain and support persons of a class mentioned in the act, the state would appropriate and pay to such county the sums of money therein stated. This, it was held, was the equivalent of an offer upon condition, and upon the performance of the condition by any county the offer became a promise, and binding as such upon the state.¹

§ 11. Executory and Executed Contracts.—Contracts are either executory or executed. It is provided by section 1661 of the Civil Code that “An executed contract is one, the object of which is fully performed. All others are executory.”² The distinction would seem to relate to the legal effect of a contract at two different stages. Or, as it has been expressed, an executed contract is “something which has been but is no longer a contract as defined in the Civil Code, section 1549.”³ Clearly, then, an agreement performed or partly performed on one side only is not an executed contract.⁴

An account stated is a mere unperformed promise by one party to pay a stated sum to another, and it is there-

19. *Chapman v. Jocelyn*, 182 Cal. 294, 187 Pac. 962 (and cases cited). See MUNICIPAL CORPORATIONS.

20. *Hollywood etc. School Dist. v. Keyes*, 12 Cal. App. 172, 107 Pac. 129. See PUBLIC SECURITIES.

1. *County of San Luis Obispo v. Gage*, 139 Cal. 398, 73 Pac. 174. See COUNTIES.

2. *Anderson v. Adler*, 42 Cal. App. 776, 184 Pac. 42; *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Alsaga v. Hart*, 37 Cal. App. 770,

174 Pac. 684; *Wong Ah Sure v. Ty Fook*, 37 Cal. App. 465, 174 Pac. 64; *Dean v. Sedan Milling Co.*, 19 Cal. App. 28, 124 Pac. 736; *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265.

3. *Reed v. Schon*, 2 Cal. App. 55, 83 Pac. 77.

4. *Wong Ah Sure v. Ty Fook*, 37 Cal. App. 465, 174 Pac. 64; *Dean v. Sedan Milling Co.*, 19 Cal. App. 28, 124 Pac. 736.

fore an executory contract.⁵ A mere agreement to sell, no title having passed, no possession given or offered, and no present transfer agreed upon and the particular property not identified, is purely an executory contract.⁶ Thus where the contract expressly stated that there should be no sale of the goods until such time as the seller should exhibit to the purchaser evidence of title to the same, which he had not done, it was held that the contract was an executory agreement to sell, and not an executed sale, conditional or otherwise.⁷ If, however, the goods are identified, and the price per unit agreed upon, the fact that weighing or measuring is necessary to ascertain the price or the quantity, does not prevent the transaction from being an executed contract of sale.⁸ A transfer is an executed contract.⁹

The requirement that an agreement, in order to be executed, must be fully performed on both sides is strictly enforced when an attempt is made to set up a modification of a written contract by an oral one, under section 1698 of the Civil Code.¹⁰ Such an oral agreement cannot consist of mere forbearance to sue by one of the parties without consideration.¹¹ An oral agreement extending the time in which a written agreement is to be performed is executory, and cannot be executed until the agreed period of time has elapsed.¹²

5. *Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156; *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 133.

6. *Alsaga v. Hart*, 37 Cal. App. 770, 174 Pac. 684. See SALES; VENDOR AND PURCHASER.

7. *Jasper v. Presley*, 28 Cal. App. 405, 152 Pac. 941.

8. *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248. See SALES.

9. *J. I. Case Threshing Mach.*

Co. v. Copren Bros., 32 Cal. App. 194, 162 Pac. 647; *Reed v. Schon*, 2 Cal. App. 55, 83 Pac. 77. See ASSIGNMENTS, vol. 3, p. 234.

10. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159 (and cases cited); *Dean v. Sedan Milling Co.*, 19 Cal. App. 28, 124 Pac. 736. See *infra*, §§ 226-230, as to modification of contracts.

11. *Dean v. Sedan Milling Co.*, 19 Cal. App. 28, 124 Pac. 736.

12. *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060; *Thomp-*

§ 12. **Void and Voidable Contracts.**—There is a wide difference between void and voidable contracts. Hence, the determination as to which of these classes embraces a particular contract is of much practical importance. For clearly, the proof of a void contract will not support the averment of one which is merely voidable.¹³ A void contract is one which is not enforceable, as for example, a contract which fails to comply with statutory requirements¹⁴—a contract which requires no disaffirmance or rescission to avoid it,¹⁵ and one which cannot be validated by ratification,¹⁶ or, as it has been declared, one any attempted ratification of which must in itself be the equivalent of an original contract.^{16a} But, although a void contract is regarded as a mere nullity,^{16b} with regard to findings there is a distinction between a void contract, or contract declared to be void by law, and no contract. In the former case, where there is an agreement between competent parties, there is, *ex vi termini*, a contract, and, where

son v. Gerner, 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900.

13. *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Maionchi v. Nicholini*, 1 Cal. App. 690, 82 Pac. 1052.

14. *Reams v. Cooley*, 171 Cal. 150, Ann. Cas. 1917A, 1260, 152 Pac. 293; *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510 (quoting from Wharton on Contracts, to the effect that a contract failing to comply with the statute of frauds, although not illegal, is void); *Kellogg v. Howes*, 81 Cal. 170, 6 L. R. A. 588, 22 Pac. 509. But see *Durbin v. Hillman*, 33 Cal. App. Dec. 800, 195 Pac. 274, wherein the court declares: "But those contracts that come under the provisions of the

statute of frauds, other than those relating to transfers of interests or estates in real property are only 'invalid.' (Citing Civ. Code, §§ 1091, 1624) . . . Such contracts may be ratified, and it is held that the benefit of the statute may be waived." See **FRAUDS, STATUTE OF**. See *infra*, §§ 147-160, as to formal requisites. And see *supra*, § 9.

15. *Garcia v. California Truck Co.*, 183 Cal. 767, 192 Pac. 708.

16. *Reams v. Cooley*, 171 Cal. 150, Ann. Cas. 1917A, 1260, 152 Pac. 293; *Hakes Investment Co. v. Lyons*, 166 Cal. 557, 137 Pac. 911; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Clinton Construction Co. v. Clay*, 34 Cal. App. 625, 168 Pac. 588.

16a. *Durbin v. Hillman*, 33 Cal. App. Dec. 800, 195 Pac. 274.

16b. *Durbin v. Hillman*, 33 Cal. App. Dec. 800, 195 Pac. 274.

the agreement is in writing, a written contract. Hence, where the evidence shows the existence of a contract, such fact, with the facts bearing on its validity, should be found, relegating to the conclusions of law—if the court should be of such opinion—the legal conclusion that it is void.¹⁷

While the law does not give a right of action on a void agreement, it may regard such agreement as morally binding; and where money has been paid, or services rendered, in the performance of the conditions of the contract by one party thereto, and the other party fails voluntarily to perform on his part, the law, to do justice to the former, may imply an *assumpsit*.¹⁸ A void contract is to be distinguished in this respect from an illegal contract. It is a rule with few exceptions^{18a} that money paid in furtherance of an illegal contract cannot be recovered.¹⁹

A voidable contract is one which binds one party but not the other. It is valid until disaffirmed by the party entitled to avoid it.²⁰ Contracts of infants,¹ and those of persons of unsound mind made before their incapacity has been judicially determined,² are notable examples of this class. A contract valid in its inception may become voidable or impossible of performance by the failure of a subsequent contingency; but, if the contingency is one which may happen, the parties are bound by their contract until it can be determined that it cannot be enforced.³ There are many familiar applications of this rule, one of the most common being where parties contract for a sale of

17. Code Civ. Proc., § 633; Cal. Iron Construction Co. v. Bradbury, 138 Cal. 328, 71 Pac. 346.

18. Whyte v. Rosenerantz, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436; City of Los Angeles v. City Bank, 100 Cal. 18, 34 Pac. 510; Fuller v. Reed, 88 Cal. 99. See *ASSUMPSIT*, vol. 3, p. 372.

18a. See *infra*, §§ 63, 108, 109.

19. City of Los Angeles v. City Bank, 100 Cal. 18, 34 Pac. 510.

See *infra*, §§ 56–112, as to illegal contracts generally.

20. Garcia v. California Truck Co., 183 Cal. 767, 192 Pac. 708; Willcox v. Edwards, 162 Cal. 455, Ann. Cas. 1913C, 1392, 123 Pac. 276 (usurious contract); Matthews v. Ormerd, 140 Cal. 578, 74 Pac. 136 (usurious contract).

1. See *infra*, § 15. See *INFANTS*.

2. See *infra*, § 14.

3. Nannizzi v. Caprile, 30 Cal. App. Dec. 135, 185 Pac. 673.

real estate, contingent upon an attorneys' approval of title. Such a contract is obligatory upon the parties until it is shown that the attorney will not or cannot approve title.⁴ In case of fraud, contracts are voidable but not void.⁵ Where a contract is made under an injurious mistake or ignorance of a material fact, it is voidable; and this rule is not limited to cases where there has been a fraudulent concealment and suppression of facts, but extends also to cases of innocent misapprehension and mistake.⁶ The mere fact that a contract is not specifically enforceable does not render it either void or voidable.⁷

II. PARTIES.

§ 13. **In General.**—The first essential to the existence of a contract, as designated by section 1549 of the Civil Code, is that there shall be parties capable of contracting. As a general rule, such capacity is to be determined by the law of the place where the contract is made.⁸ Section 1556 of the Civil Code provides that

“All persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights.”

This section is subject to the qualification of the following one which reads:

“Minors and persons of unsound mind have only such capacity as is defined by part one of division one of this code.”⁹

4. *Nannizzi v. Caprile*, 30 Cal. App. Dec. 135, 185 Pac. 673. Such contract is defeasible upon the happening of a condition subsequent. See *VENDOR AND PURCHASER*.

5. *Deasy v. Taylor*, 39 Cal. App. 235, 178 Pac. 538. See *infra*, § 39.

6. *Verzan v. McGregor*, 23 Cal. 339. See *infra*, §§ 46-57, as to mistake generally.

7. *Norris v. Lilly*, 147 Cal. 754, 109 Am. St. Rep. 188, 82 Pac. 425. See *SPECIFIC PERFORMANCE*.

8. *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, 157 Pac. 630. See *CONFLICT OF LAWS*, vol. 5, p. 449.

9. See *infra*, § 15, as to minors; § 14 as to persons of unsound mind.

In amplification of the code requirement it is to be noted that the creation of a contractual obligation requires an agreement between two or more persons. There must be the assent of two separate independent minds; no man can effectually make a contract with himself.¹⁰ A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards and with knowledge of all the circumstances to ratify the act of his agent.¹¹ The law, for wise reasons, does not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity.¹² There is, of course, no contract between the government and governed, for but one party is concerned—the public.¹³ Where the contract is one within the power of the parties to make, and one by the parties advisedly made, it should be enforced unless adequate cause be shown for setting aside its provisions.¹⁴

Capacity to contract is not to be confused with ability to perform. It would, it has been said, work great injustice to hold that no one can make a valid contract unless he is clothed with the present power of performance. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser is not at liberty to disaffirm the contract on the ground that the vendor is unable to make a good title. Upon the day of performance it is incumbent upon the vendee to

10. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729 (sale).

11. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42. See *BROKERS*, vol. 4, p. 545.

12. Civ. Code, § 2229; *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac.

550; *Sims v. Petaluma Gaslight Co.*, 131 Cal. 656, 63 Pac. 1011; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Davis v. Rock Creek etc. Min. Co.*, 55 Cal. 359, 36 Am. Rep.

40. See *AGENCY*, vol. 1, p. 683.

13. *Payne v. Treadwell*, 16 Cal. 220. See *infra*, § 19.

14. *Estate of Colton*, 164 Cal. 1, 127 Pac. 643.

offer to perform, or to show that at the time for performance the vendor could not furnish the title.¹⁵

In view of the fact that the contractual capacity of particular classes and aggregations of persons is fully treated under appropriate titles, it suffices in the following sections merely to call to attention the most general rules concerning the same.

§ 14. Persons Non Compos.—The term “non compos” includes all kinds of mental unsoundness recognized by the law.¹⁶ A contract made by one lacking the mental capacity to contract is clearly void and without effect.¹⁷ Consent or assent is essential to the existence of a contract, and one cannot be said to assent unless he is endowed with such degree of reason and judgment as will enable him to comprehend the subject of negotiation.¹⁸ Courts cannot, however, measure the mental capacity of every person who enters into a business transaction. There is, it has been observed, as much difference in the capacities of parties to make contracts or to enter into business transactions as in their weight, height or features.¹⁹

As an aid to the courts in this difficulty certain code provisions have been enacted. Sections 38 and 39 of the Civil Code emphasize the difference between contracts made by persons of unsound mind who are “entirely without understanding” and contracts by persons of unsound mind who are “not entirely without understanding,” made before incapacity has been judicially deter-

15. *Brimmer v. Salisbury*, 167 Cal. 522, 140 Pac. 30; *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Anderson v. Willson*, 32 Cal. App. Dec. 646, 191 Pac. 1016. See *VENDOR AND PURCHASER*.

16. *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247.

17. *Harris v. Harris*, 64 Cal. 108, 28 Pac. 63 (sale of personal prop-

erty); *Crowley v. City R. R. Co.*, 60 Cal. 628 (intoxication). And see *INSANE PERSONS* for a detailed treatment of contracts of persons mentally incompetent.

18. *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247. See *infra*, § 22 et seq., as to consent as essential element of contract.

19. *Dickie v. Steiger*, 4 Cal. App. 622, 88 Pac. 814, per Cooper, J.

mined.²⁰ Under the former section a person entirely without understanding has no power to make a contract of any kind.¹ By the provisions of the latter section, the contract of a person of unsound mind, although not entirely deprived of understanding nor judicially determined to be insane, is not void but merely voidable. Section 40 of the Civil Code is to the effect that a person of unsound mind whose incapacity has been judicially determined cannot make a contract nor delegate any power until his restoration to capacity.² It would seem, therefore, that a person may be insane in the general acceptance of the term, and yet his insanity may be of such a character as not to deprive him entirely of the power of understanding the nature of ordinary business transactions, and that such form of insanity, or rather unsoundness of mind, does not render a person incapable of entering into a valid contract.³

By virtue of the provisions of section 39 of the Civil Code a conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of the code.⁴ To avail himself of this statutory remedy, it is not necessary for a person to be incompetent

20. *Maionchi v. Nicholini*, 1 Cal. App. 690, 82 Pac. 1052.

1. *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276.

2. *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276 (a finding that grantor "fully understood the transaction" involves inference that he was not "entirely without understanding"); *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247 (holding mortgage void because of mortgagor's lack of understanding); *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804 (holding deed to vest title under facts, although voidable); *More v. Calkins*, 85 Cal. 177, 24 Pac. 729;

San Francisco Credit Clearing-house v. MacDonald, 18 Cal. App. 212, 122 Pac. 964; *Maionchi v. Nicholini*, 1 Cal. App. 690, 82 Pac. 1052 (complaint asking rescission on ground that plaintiff was of unsound mind cannot be amended to allege that he was entirely without understanding).

3. *San Francisco Credit Clearing-house v. MacDonald*, 18 Cal. App. 212, 122 Pac. 964, per Lennon, J.

4. *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Carr v. Sacramento Clay Products*, 35 Cal. App. 439, 170 Pac. 446. See *infra*, §§ 230-236.

to make any kind of a contract or to transact any business however simple. The test has been declared to be: Was the party mentally competent to deal with the subject before him with a full understanding of his rights? Did he actually understand the nature, purpose and effect of the contract? Such is the question to be determined by the court or jury, and if there is found in the evidence any rational ground for holding that the person executing the contract was thus mentally deficient, it may be avoided.⁵ In the case of intoxication, it is not alone the influence of liquor which avoids a contract, but it must be shown to exist to such extent as seriously to impair the reasoning faculties at the time of the contract.⁶

Manifestly, the right to rescind a contract entered into with a person of unsound mind is, by the provisions of section 39 of the Civil Code, conferred solely upon the incompetent or his representatives, and until that right is exercised, the contract is binding upon the party of sound mind. Nor can the provisions of section 38 be invoked by a person of sound mind in an attempted avoidance of a contract which he may have made with a person subsequently ascertained to be of unsound mind.⁷ In consonance with the general rule regarding rescission, a person of unsound mind cannot rescind a contract unless he restores or offers to restore the consideration received.⁸

§ 15. Infants.—The disability of infants to make contracts has always been recognized.⁹ At common law

5. *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, 103 Pac. 190; *Jacks v. Deering*, 150 Cal. 272, 88 Pac. 909; *Carr v. Sacramento Clay Products Co.*, 35 Cal. App. 439, 170 Pac. 446; *Edmunds v. Southern Pac. Co.*, 18 Cal. App. 532, 123 Pac. 811 (mental derangement due to physical injury). See *INSANE PERSONS*.

6. *Phelan v. Gardner*, 43 Cal. 306; *Pickett v. Sutter*, 5 Cal. 412.

7. *San Francisco Credit Clearing-house v. MacDonald*, 18 Cal. App. 212, 122 Pac. 964.

8. *More v. Calkins*, 85 Cal. 177, 24 Pac. 729. See *infra*, §§ 231-237, as to rescission generally. See, also, *CANCELLATION OF INSTRUMENTS*, vol. 4, p. 756.

9. See *INFANTS*, for complete discussion of the rules governing contracts of infants.

there was some divergence in the cases upon the question whether some classes of contracts of an infant were absolutely void and others voidable only, or whether all were merely voidable.¹⁰ The law of California on the subject is crystallized in a few sections of the Civil Code.¹¹ In one respect at least the code provisions show a divergence from the common-law rules previously recognized. In an early decision it was held that contracts of infants constituting a delegation of power or authority to another to act for them were not void but merely voidable; that an infant might execute a promissory note by his agent.¹² With this standing as a rule, it is obvious that the intention of the legislature in framing section 33 of the Civil Code was to change it and to declare the rule that an infant cannot execute contracts through an agent having only a delegated authority executed by the infant.¹³

A contract or conveyance of a minor may be avoided by him by any act or declaration disclosing an unequivocal intent to repudiate its binding force and effect, and it is questionable whether express notice of disaffirmance to the adverse party is required, provided the act or declaration of repudiation is in its nature public and unequivocal.¹⁴ And the rule is settled that no one can take advantage

10. *Hakes Investment Co. v Lyons*, 166 Cal. 557, 137 Pac. 911.

11. Civ. Code, §§ 33-37. Section 33 reads as follows: "A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control." Section 34 provides: "A minor may make any other contract than as above specified, in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this title, and subject to the provisions of the titles on

marriage, and on master and servant."

12. *Hastings v. Dollarhide*, 24 Cal. 195.

13. *Hakes Investment Co. v Lyons*, 166 Cal. 557, 137 Pac. 911 (declaring that this purpose is indicated by the fact that the authors of the code, in their annotated edition thereof, append to that section a note citing the cases which declare the rule that such delegation of power is absolutely void).

14. *Spencer v. Collins*, 156 Cal. 298, 20 Ann. Cas. 49, 104 Pac. 320. See Civ. Code, §§ 35-37, with reference to the disaffirmance of contracts by an infant.

of the fact of infancy except the infant himself, or his heirs or personal representatives. To hold otherwise, it has been argued, would make the disability of infancy a "sword" rather than a "shield."¹⁵

§ 16. Married Women.—At common law a married woman could enter into no contract, and her husband could not convey property to her, but only to a trustee for her benefit.¹⁶ It is now the policy of the law, however, to treat a married woman as competent to contract, and of equal dignity with man as to her separate property and her dealings with it.¹⁷ The code has abrogated almost all of the common-law limitations and restrictions, and has relieved her from the disabilities under which she formerly labored, and in respect to her property and contracts has taken away the supervision or control which the husband formerly exercised.¹⁸ She may now enter into any engagement or transaction respecting her property which she might if unmarried.¹⁹ She may mortgage it, or convey it by deed of trust, to secure her husband's debts, and having done so, the creditors may enforce their claims against it in the same manner and to the same extent that they could if it were his property, and not hers.²⁰ A married woman may, of course, bind herself by a promissory note,¹ even if it is not given in a transaction respecting her separate property.²

§ 17. Husband and Wife.—In California, "Either husband or wife may enter into any engagement or transac-

15. *Hastings v. Dollarhide*, 24 Cal. 195. See **INFANTS**.

16. *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231. See **HUSBAND AND WIFE**, for a full discussion of the rights and liabilities of married women with reference to contracts. See, also, **COMMUNITY PROPERTY**, vol. 5, p. 261.

17. *Farmers' etc. Bank v. De Shorb*, 137 Cal. 685, 70 Pac. 771.

18. *Marlow v. Barlew*, 53 Cal. 456 (citing code sections).

19. Civ. Code, § 153; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643.

20. *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Alexander v. Bouton*, 55 Cal. 15.

1. *Marlow v. Barlew*, 53 Cal. 456.

2. *Wood v. Orford*, 52 Cal. 412. See **HUSBAND AND WIFE**.

tion with the other, or with any other person, respecting property, which either might if unmarried.”³ But in giving a wife the right freely to contract in regard to property with her husband, the legislature naturally sought to give her some protection from his influence. So it is further provided that transactions between husband and wife are subject “to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title of trusts.”⁴

Notwithstanding this freedom to enter into any contract between themselves or with other persons, it has been repeatedly held that an agreement between husband and wife founded upon consideration to withdraw or abandon a defense to a suit for divorce, or do anything to facilitate procuring the same, is illegal and void.⁵ Section 159 of the Civil Code provides that

“A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation.”

The application of this rule, it has been held, does not extend to an agreement by the parties to an action for divorce, made during the trial, that the case be submitted on the evidence then in, and that the husband abandon to the wife real estate standing in her name but claimed

3. Civ. Code, § 158; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *Newman v. Freitas*, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, 7 Pac. 705; *McCahan v. McCahan*, 31 Cal. App. Dec. 1107, 190 Pac. 460; *In re Patterson's Estate*, 31 Cal. App. Dec. 630, 189 Pac. 483; *Stoff v. Erken*, 25 Cal. App. 528, 144 Pac. 312; *Estate of Menihan*, 6 Cal. Prob. Dec. 535. See HUSBAND AND

WIFE; COMMUNITY PROPERTY, vol. 5, p. 261.

4. *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 781.

5. *Newman v. Freitas*, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907; *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801; *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Stoff v. Erken*, 25 Cal. App. 528, 144 Pac. 312. See DIVORCE AND SEPARATION.

by him to be community property, upon her executing to him a mortgage on the property.⁶ An agreement between a husband and wife settling their rights as to the community property is authorized by section 158 of the Civil Code.⁷

§ 18. Corporations.—There are several powers and capacities which, tacitly and without any express statutory provision, are considered as inseparable from every corporation, among which is the power to make contracts and to contract obligations.⁸ And private corporations, with regard to the making of contracts, are placed upon the same footing as natural persons, unless limited to some particular mode by their charters.⁹ Under the code, every corporation, as such, has the power "To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purpose of the corporation."¹⁰ And where the power to contract exists, it may be exercised by the corporation or its agent, in the same way that a natural person could contract, unless restrained by its charter to some particular mode of contracting.¹¹ With respect to ordinary business contracts a municipal, or quasi-municipal, corporation, stands on the same footing as other corporations.¹²

§ 19. Government.—It is a settled rule, applicable alike to states and to the United States, that whenever a govern-

6. *Stoff v. Erken*, 25 Cal. App. 528, 144 Pac. 312. And see *Estate of Menihan*, 6 Cal. Prob. Dec. 535 (upholding a similar agreement). See DIVORCE AND SEPARATION.

7. *Estate of Sloan*, 179 Cal. 393, 177 Pac. 150. See COMMUNITY PROPERTY, vol. 5, p. 261.

8. *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620. See CORPORATIONS, where contracts of corporations are discussed in detail.

9. *Carey v. Philadelphia & C. Petroleum Co.*, 33 Cal. 694.

10. Civ. Code, § 354, subd. 8; *Woods Lumber Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855; *McKiernan v. Lenzen*, 56 Cal. 61.

11. *McKiernan v. Lenzen*, 56 Cal. 61. See CORPORATIONS.

12. *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503. See MUNICIPAL CORPORATIONS.

ment descends from the plane of sovereignty and contracts with persons, such government is regarded as a private person itself and is bound accordingly. A state in its contracts with individuals is judged and must abide by the rules which govern similar cases between individuals; and, whenever such a contract comes before the courts, the rights and obligations of the contracting parties are adjudged upon the same principles as if both contracting parties were private persons.¹³ As has been declared, however, the law of private contracts is not applicable where the state, in its general or local capacity, is a party, in respect to the mode or measure of enforcement.¹⁴ In other words, the state cannot be sued, except by its own consent.¹⁵

§ 20. Identification.—It is essential to the validity of a contract, not only that parties exist, but that it be possible to identify them.¹⁶ A person is not bound by an agreement to which he is not a party, or the benefits of which he has not shared.¹⁷ There is an important distinction between a description of a party which is inherently uncertain and indeterminate and one which is merely imperfect and capable of different applications. The former cannot be corrected, but in the latter case there may be a resort to extraneous facts to ascertain the individuals to whom the description was intended to apply; and the greater or less probability of ascertaining this does not

13. *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568; *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457. See *STATE OF CALIFORNIA; UNITED STATES*.

14. *Sharp v. Contra Costa County*, 34 Cal. 284.

15. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416. See as to consent to sue the state, Const., art. XX, sec. 6, and act of Feb. 28, 1893, Stats. 1893, p. 57, § 1.

16. Civ. Code, § 1558; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179 (holding contract of sale of real estate was too uncertain as to the purchaser to be enforced). See *infra*, §§ 201-204, as to interpretation of contract with reference to parties thereto.

17. *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834; *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983; *Gray v. Bonnell*, 19 Cal. App. 243, 125 Pac. 355.

affect the validity of the instrument.¹⁸ So, while it is true that where, in the body of an instrument, no words appear to define the agreement as made on behalf of a party other than he whose signature is attached, it will not be deemed to be the contract of another, though there appear after the signature such qualifying or descriptive words as "president," "secretary," or "cashier";¹⁹ yet, in such cases parol evidence is admissible to identify the party against whom the obligation is legally chargeable.²⁰

The identity of the parties to a contract may be determined by conduct. Thus, one failing to sign a contract made for him is nevertheless bound if he accepts it and acts upon it.¹ The same principle applies to one for whose benefit a contract is made if he takes advantage of its provisions and proceeds to act under them.² It is not necessary that the parties for whose benefit a contract is made should be named therein. It must appear, however, by the direct terms of the contract that it was made for the benefit of such parties.³ Sureties on a bond given to guarantee the execution of a contract become parties to the same as though they had actually made and executed the contract itself.⁴

§ 21. Substitution.—Under the definition of obligation contained in section 1427 of the Civil Code, the identity of the person to whom the duty is owing may be changed without changing the obligation itself or creating a new

18. *Woodward v. McAdam*, 101 Cal. 438, 35 Pac. 1016.

19. *Hay v. McDonald*, 21 Cal. App. 204, 131 Pac. 74.

20. *Otten v. Spreckels*, 24 Cal. App. 251, 141 Pac. 224; *Hay v. McDonald*, 21 Cal. App. 204, 131 Pac. 74. As to the rule concerning *descriptio personae*, see *AGENCY*, vol. 1, p. 822.

1. *Fidelity & Casualty Co. v. Fresno Flume & Irr. Co.*, 161 Cal. 466, 37 L. R. A. (N. S.) 322, 119 Pac.

646. See *infra*, §§ 30–36, as to acceptance of offer to contract.

2. *Barlow v. Frink*, 171 Cal. 165, 152 Pac. 290. See *infra*, § 34. As to enforcement of contract for benefit of third person, see *infra*, §§ 279–281.

3. *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100.

4. *W. P. Fuller & Co. v. Alturas School District*, 28 Cal. App. 609, 153 Pac. 743. See *SURETYSHIP*.

obligation.⁶ But, as declared in the code, the burden of an obligation may not be transferred without the consent of the party entitled to the benefit.⁸ "Everyone has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'you have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.'"⁷ Whether a given contract is assignable or not is a question of construction. The intention of the parties must be gathered from a consideration of the terms and entire tenor of the contract, and if upon such consideration it appears that the contract calls for the performance of an obligation purely personal in its nature, the rule in general is that the obligation cannot be assigned without the consent of the party to be benefited.⁹

III. CONSENT.

In General—Sufficiency.

§ 22. **Necessity and Essentials.**—Mutual consent is necessary to the existence of any contract.⁹ Assent¹⁰ of at least two minds to each and all of the essentials of the agreement is required; and it is only upon evidence of such

5. *Steinbach v. Smith*, 34 Cal. App. 223, 167 Pac. 189.

6. Civ. Code. § 1457; *Woodard v. Grover*, 156 Cal. 581, 105 Pac. 736; *Montgomery v. De Picot*, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305. See *ASSIGNMENTS*, vol. 3, p. 230; *NOVATION*.

7. *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 32 L. Ed. 246, 8 Sup. Ct. Rep. 1308, see, also, *Rose's U. S. Notes*, per *Gray, J.*, quoted with approval in *Montgomery v. De Picot*, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305.

8. *Montgomery v. De Picot*, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305. See *ASSIGNMENTS*, vol. 3, p. 244, for full discussion of assignability of contracts for personal services.

9. Civ. Code, §§ 1550, 1565. See article in 2 *California Law Review*, entitled, "Mutual Assent in Contract under the Civil Code of California."

10. The cases use the terms "consent" and "assent" interchangeably and as synonymous.

assent that the law enforces the terms of a contract or gives a remedy for a breach of it.¹¹ One cannot be made to stand on a contract to which he never consented.¹² On the other hand, the consent of one not obligated by an agreement is not necessary.¹³ But a contract which is voidable solely for want of due consent may be ratified by a subsequent consent.¹⁴ Section 1565 of the Civil Code provides: "The consent of the parties to a contract must be: 1. Free; 2. Mutual; and, 3. Communicated by each to the other."¹⁵

§ 23. Consent Free.—Consent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress or mistake.¹⁶ The code provides that "An apparent consent is not real or free when obtained through (1) duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake."¹⁷ Consent is deemed to have been ob-

11. *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054; *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797; *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707; *Ferguson v. Ash*, 27 Cal. App. 375, 150 Pac. 657; *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 117 Pac. 936.

12. *Cummings v. Ross*, 90 Cal. 68. Of course this rule is affected by the law relating to mistake. See *infra*, §§ 46-57.

13. *Sullivan v. Grass Valley Quartz Mill etc. Co.*, 77 Cal. 418.

14. Civ. Code, § 1588. See *infra*, § 57.

15. *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707; *Cyclops Iron Works v. Chico Ice etc. Co.*, 34 Cal. App. 10, 166 Pac. 821; *Ferguson v. Ash*, 27 Cal. App. 375, 150 Pac. 657; *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 Pac. 42 (holding facts showed such consent); *American Can Co. v. Agri-*

cultural Ins. Co., 12 Cal. App. 133, 106 Pac. 720.

16. *Butler v. Collins*, 12 Cal. 457.

17. Civ. Code, § 1567; *Lundeen v. Ottis*, 164 Cal. 183, 128 Pac. 335 (declaring nothing appeared from evidence to show consent was not free); *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068 (menace); *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707 (consent induced by fraud); *Ferguson v. Ash*, 27 Cal. App. 375, 150 Pac. 657 (mistake); *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 Pac. 42 (holding evidence showed execution of contract was voluntary); *Bancroft v. Bancroft*, 110 Cal. 374, 42 Pac. 896, sustaining 5 Cal. Unrep. 31, 40 Pac. 488 (holding no ground for avoiding contract though want of free consent was shown).

As to freedom of consent in conveyances of real property, see **DEEDS**.

tained by duress, menace, fraud, undue influence or mistake only when it would not have been given had such cause not existed.¹⁸ But, as has been happily observed, persuasion is not coercion; insistence upon one's legal rights is not undue influence, and pertinacious zeal to secure the payment of a just debt is not fraudulent.¹⁹

Section 1566 of the Civil Code provides that "A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission."²⁰ This section, taken in connection with the other sections of the Civil Code relative to reality of consent, seems to establish the rule beyond all controversy that a contract cannot be rescinded when it appears that consent would have been given and the contract entered into notwithstanding the duress, menace, fraud, undue influence or mistake relied upon.¹ But these sections are not to be construed as laying down the rule that contracts lacking in consent are always merely voidable, and may not, under some circumstances, be absolutely void.²

§ 24. Consent Mutual.—There can be no contract unless the minds of the parties have met and mutually agreed.³

18. Civ. Code, § 1568; *Stockton etc. Agr. Works v. Glen's Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633 (fraud); *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707; *Van Valkenburgh v. Oldham*, 12 Cal. App. 572. See *infra*, §§ 37-57.

19. *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 Pac. 42, per Burnett, J.

20. *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454 (fraud); *Bancroft v. Bancroft*, 110 Cal. 374,

42 Pac. 896, sustaining 5 Cal. Unrep. 31, 40 Pac. 488.

1. *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16.

2. *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556; *La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053; *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; *Holmes v. Salamanca Gold Mining etc. Co.*, 5 Cal. App. 659, 91 Pac. 160. See *infra*, § 45.

3. *Salisbury v. Yawger*, 61 Cal. Dec. 157, 195 Pac. 682 (holding correspondence made it clear that plaintiff was acting as agent for sale of land and was not purchasing for himself, and hence, that he

Consent is not mutual unless all the parties agree upon the same thing in the same sense.⁴ The minds of contracting parties must draw together and become as one touching the subject matter and the terms and conditions before a contract can be consummated.⁵

In this connection it is to be noted that although the preliminary negotiations of parties, had with the intent of deciding upon the terms of a proposed contract, may ultimately be embodied therein, yet they cannot be held to form a definite agreement so that it may be said that the minds of the parties have met, at any time prior to actual consummation. Until the terms of an agreement have received the assent of both parties, the negotiations are open. Nor

could not enforce the contract in his own behalf); *Providence Jewelry Co. v. Nagel*, 157 Cal. 497, 108 Pac. 312 (evidence showed minds of parties did not meet); *Harper v. Goldschmidt*, 156 Cal. 245, 134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689, 104 Pac. 451; *German Savings & Loan Soc. v. McClellan*, 154 Cal. 710, 99 Pac. 194 (lack of mutual understanding between parties); *Peerless Glass Co. v. Pacific Crockery & Tinware Co.*, 121 Cal. 641, 54 Pac. 101 (holding that even though there was no meeting of minds, since the defendant had received and sold goods contracted for, he was liable on quantum valebat); *Meux v. Hogue*, 91 Cal. 442, 27 Pac. 744 (minds failed to meet); *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136 (letters offered in evidence did not disclose meeting of minds); *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179 (contract too uncertain to be enforced); *Rovegno v. Defferari*, 40 Cal. 459 (mutual misunderstanding); *Marin Rock Co. v. Stone Co.*, 33 Cal. App. Dec. 657, 194 Pac. 734 (correspondence held to show contract); *Marin Rock Co. v. Stone*

Co., 33 Cal. App. Dec. 588, 194 Pac. 732 (correspondence held not to show contract); *Marx & Rawolle v. Standard Soap Co.*, 42 Cal. App. 32, 183 Pac. 225 (letters did not establish completed contract); *Hudson v. Barneson*, 41 Cal. App. 633, 183 Pac. 274 (agreement for services of architect); *Hollywood etc. School District v. Keyes*, 12 Cal. App. 172, 107 Pac. 129. See, also, *DEEDS*.

4. Civ. Code, § 1580; *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897 (order for catalogued goods supposedly in stock, which had to be manufactured); *Farmers' National Gold Bank v. Stover*, 60 Cal. 387; *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133.

5. *Leventritt v. Cowell*, 21 Cal. App. 597, 132 Pac. 627; *Philip Wolf & Co. v. King etc.*, 1 Cal. App. 749, 82 Pac. 1055. See *Humphrey v. Farmer's Union & Milling Co.*, 32 Cal. App. Dec. 35, 190 Pac. 489, holding there was a meeting of the minds of the parties upon the same terms and conditions, excepting upon one which the law would imply in any event. As to mistake, see *infra*, §§ 46-57.

can the parties be *ad idem* when essential parts of their intended agreement are to be determined by future negotiations.⁶ An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and fix upon the terms of a contract, if possible, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where the preliminaries leave certain terms to be agreed upon later for the purpose of a final contract, there can be no implication of what the parties will agree upon.⁷ The same rule applies whether the preliminary negotiations were oral or in writing, if it manifestly appears that certain parts of the contract were later to be agreed upon and inserted in a formal draft.⁸

The rule that an agreement to be binding as a contract must embrace all the terms the parties intend to introduce, is general in California whether the question arises in a suit for specific performance,⁹ in an action to foreclose a mortgage,¹⁰ in an action to quiet title,¹¹ or in an action for damages.¹² Where there is a misunderstanding as to

6. *Mercantile Trust Co. v. Sunset Road Oil Co.*, 176 Cal. 461, 168 Pac. 1037; *Las Palmas etc. Distillery v. Garrett & Co.*, 167 Cal. 397, 139 Pac. 1077; *Roney v. Reynolds*, 152 Cal. 323, 92 Pac. 847 (holding negotiations of parties concerning loan were inchoate); *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797; *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367, 35 Pac. 1000; *Pacific Rolling-Mill Co. v. Riverside etc. Ry. Co.*, 90 Cal. 627, 27 Pac. 525; *Yore v. Bankers' etc. Life Assn.*, 88 Cal. 609, 26 Pac. 514; *Los Angeles etc. Co-operative Assn. v. Phillips*, 56 Cal. 539; *Fuller v. Reed*, 38 Cal. 99; *Dillingham v. Dahlgren*, 34 Cal. App. Dec. 1053, 198 Pac. 832;

Durst v. Jolly, 35 Cal. App. 184, 169 Pac. 449; *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 117 Pac. 936. See *infra*, § 33, as to subsequent reduction to writing.

7. *Dillingham v. Dahlgren*, 34 Cal. App. Dec. 1053, 198 Pac. 832, per Langdon, P. J.

8. *Dillingham v. Dahlgren*, 34 Cal. App. Dec. 1053, 198 Pac. 832.

9. *Los Angeles etc. Co-operative Assn. v. Phillips*, 56 Cal. 539.

10. *Mercantile Trust Co. v. Sunset etc. Oil Co.*, 176 Cal. 461, 168 Pac. 1037.

11. *Durst v. Jolly*, 35 Cal. App. 184, 169 Pac. 449.

12. *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367, 35 Pac.

the terms of a contract, neither party is liable in law or equity.¹³ And where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and therefore neither is bound.¹⁴

§ 25. Communication of Consent.—As provided by section 1565 of the Civil Code, consent must be “communicated by each party to the other.”¹⁵ It can be communicated with effect only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication.¹⁶ An undisclosed intention to contract is, of course, insufficient to create an obligation.¹⁷ Nor can a contract be made by manifesting to strangers that assent which the law requires to be communicated mutually between the parties themselves.¹⁸ But, it is held, the provision of the code requiring communication of consent has no application to a contract by which one person makes an absolute guaranty to another of the debt or default of a third person. The provision of section 2795 of the Civil Code dispensing with notice of the acceptance of an absolute guaranty controls upon that subject.¹⁹

1000; *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 117 Pac. 936; *Las Palmas etc. Distillery v. Garrett & Co.*, 167 Cal. 397, 139 Pac. 1077.

13. *Meux v. Hogue*, 91 Cal. 442, 27 Pac. 744; *German Sav. & Loan Soc. v. McLellan*, 154 Cal. 710, 99 Pac. 194; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Cummings v. Howard*, 63 Cal. 503. See *infra*, § 46 et seq., as to mistake.

14. *Meux v. Hogue*, 91 Cal. 442, 27 Pac. 744; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179.

15. *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840 (evidence failing to show communicated acceptance); *Nevills v. Moore Min. Co.*, 135 Cal.

561, 67 Pac. 1054; *Boyd v. Brinekin*, 55 Cal. 427; *Leszynsky v. Meyer*, 6 Cal. Unrep. 53, 53 Pac. 703.

16. Civ. Code, §§ 1565, 1581; *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840; *Golden State etc. Iron Works v. Angell*, 89 Cal. 643, 27 Pac. 65 (holding conduct showed consent); *Leszynsky v. Meyer*, 6 Cal. Unrep. 53, 53 Pac. 703. See *infra*, §§ 26-36, as to offer and acceptance.

17. *Blanc v. Connor*, 167 Cal. 719, 141 Pac. 217.

18. *Leszynsky v. Meyer*, 6 Cal. Unrep. 53, 53 Pac. 703.

19. *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164. See GUARANTY.

§ 26. **Offer or Proposal.**—An analysis of consent shows two elements, namely, an offer or proposal and an acceptance of the same.²⁰ The offer must be made by the person to be held liable upon the promise,¹ and when intended for the benefit of a certain person must be communicated directly to him or his authorized agent.² But, in order to constitute an offer which may be converted into a contract by acceptance, the offer need not be addressed to a particular individual. A binding obligation may originate in advertisements addressed to the general public, as where the offer of a reward,³ or an offer inducing settlers to occupy lands,⁴ is published. Such cases, however, are to be distinguished from an advertisement for bids for public work or a request for offers. In the latter case the bids of the contractors in response to the advertisement are the offers, and the contract is consummated by the award of the work to a particular contractor by the acceptance of his bid.⁵ Similarly, the mere offering of property for sale at auction is not an offer to make a contract. The bid of the person desiring to purchase is the offer the acceptance of which by the auctioneer constitutes the contract.⁶

To whomsoever it is addressed, an offer to be binding must be definite.⁷ However, the offerer may be bound by

20. *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Campbell v. Heney*, 128 Cal. 109, 60 Pac. 532; *Gilliam v. Brown*, 126 Cal. 160, 58 Pac. 466; *Boyd v. Brinckin*, 55 Cal. 427; *People v. Board of Supervisors of San Francisco*, 27 Cal. 655. See *infra*, §§ 30–36, as to acceptance.

1. *Deane v. Gray Bros. A. S. Pav. Co.*, 109 Cal. 433, 42 Pac. 443.

2. *Canney v. South. Pac. C. R. Co.*, 63 Cal. 501.

3. *McLeod v. Meade*, 77 Cal. 87, 19 Pac. 189; *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *Berthiaume v. Doe*, 22 Cal. App. 78, 133 Pac. 515; *Wilson v. Stump*, 103 Cal.

255, 42 Am. St. Rep. 111, 37 Pac. 151. See *REWARDS*.

4. *Southern Pac. R. Co. v. Terry*, 70 Cal. 484, 11 Pac. 769; *Taylor v. Central Pac. Ry. Co.*, 67 Cal. 615, 8 Pac. 436; *Boyd v. Brinckin*, 55 Cal. 427.

5. *Argenti v. San Francisco*, 16 Cal. 255 (on petition for rehearing).

6. *Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 53 Pac. 812. See *AUCTIONS*, vol. 3, p. 755.

7. *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329; *Sutliff v. Seidenberg etc. Co.*, 132 Cal. 63, 64 Pac. 131, 469; *Van*

an offer to sell which allows the offeree to determine the quantity which he will accept. Thus, a contract by one to deliver to another as many grapes as he should wish, at a given price, is an offer, and when the person to whom the offer is made names the quantity which he will take, the contract becomes complete, and both parties are bound by it.⁸

An offer, to constitute a contract, must be one which is intended of itself to create legal relations on acceptance. A newspaper notice to the effect that all who did not take their horses out of a certain pasture would be charged a daily rental was held to be sufficient as an offer to form the basis of an implied contract as to those leaving horses within the pasture.⁹ But a notice given by the owner of a well, forbidding trespassers to take water therefrom, and demanding the payment of a certain sum per day for each and every day on which the water was taken in violation of the notice, cannot be construed as an offer by the owner to sell water at that rate, so as to bind a trespasser, who continued to take water after receipt of the notice, to pay therefor at the rate demanded, on the theory that an express contract was thereby created.¹⁰

§ 27. Continuing Offer or Option—General Nature.—Not infrequently a proposal is made to be accepted within a specified time. Such a proposal constitutes a continuing offer. A common example of continuing offers is what is termed an option.¹¹ An option is usually an agreement by which an owner invests another with the exclusive

Slyke v. Broadway Ins. Co., 115 Cal. 644, 47 Pac. 689, 928; Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671, 117 Pac. 934; Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 117 Pac. 936.

8. Keller v. Ybarru, 3 Cal. 147.

9. Grant v. Dreyfus, 5 Cal. Unrep. 970, 52 Pac. 1074.

10. Wright v. County of Sonoma, 156 Cal. 475, 134 Am. St. Rep. 140, 105 Pac. 409.

11. Thomas v. Birch, 178 Cal. 483, 173 Pac. 1102. See SALES; VENDOR AND PURCHASER.

right to buy certain property at a stipulated sum within a limited or reasonable time in the future.¹² It is, however, neither a contract of sale and purchase nor an agreement to sell and purchase.¹³ Nor is it a transfer of property, but a mere right of election acquired by one under a contract to accept or reject a present offer within a time therein fixed.¹⁴ When an option is signed by the optionee it is not, because of that signature, to be dignified by a higher name. It does not thereby evidence a contract between the signers as to the subject matter of the offer. It is a contract to keep the offer open.¹⁵ The test determinative of the question whether a given agreement relating to the sale and purchase of land is an agreement to purchase and sell the property or a mere option to purchase, is: Is the agreement capable of specific performance?¹⁶

§ 28. As Affected by Consideration.—Where an option is without consideration, it is a mere offer and may be revoked within the time limited for acceptance, provided no communication of acceptance has been made.¹⁷ Up to

12. *Johnson v. Clark*, 174 Cal. 582, 163 Pac. 1004; *Howard v. D. W. Hobson Co.*, 38 Cal. App. 445, 176 Pac. 715; *Menzel v. Primm*, 6 Cal. App. 204, 91 Pac. 754.

13. *Hicks v. Christeson*, 174 Cal. 712, 164 Pac. 395; *Howard v. D. W. Hobson Co.*, 38 Cal. App. 445, 176 Pac. 715.

14. *Ware v. Quigley*, 176 Cal. 694, 169 Pac. 377; *Decker v. Hughes*, 1 Cal. Unrep. 193.

15. *Los Angeles County Flood Control Dist. v. Andrews*, 35 Cal. App. Dec. 295, per Works, J.

16. *Johnson v. Clark*, 174 Cal. 582, 163 Pac. 1004; *Cal. Land Security Co. v. Ritchie*, 40 Cal. App. 246, 180 Pac. 625. See SPECIFIC PERFORMANCE. See, also, note in 3 A. L. R., p. 576, for discussion of instrument

for purchase of land as a contract or option.

17. *Both v. Moeller*, 61 Cal. Dec. 444, 197 Pac. 62; *Thomas v. Birch*, 178 Cal. 483, 173 Pac. 1102 (corporate stock); *W. G. Reese Co. v. House*, 162 Cal. 740, 124 Pac. 442 (land); *Russ v. Tuttle*, 158 Cal. 226, 110 Pac. 813 (corporate stock); *Brown v. San Francisco Savings Union*, 134 Cal. 448, 66 Pac. 592 (land); *Braserton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670 (land); *McCowen v. Pew*, 18 Cal. App. 302, 123 Pac. 191 (timber land); *Canty v. Brown*, 11 Cal. App. 487, 105 Pac. 429 (land); *Jolliffe v. Steele*, 9 Cal. App. 212, 98 Pac. 544 (land); *Mitchell v. Gray*, 8 Cal. App. 423, 97 Pac. 160 (mine); *Marsh v. Lott*, 8 Cal. App. 384, 97 Pac. 163 (land).

the time of acceptance, an agreement such as this, where no consideration has been parted with and no binding obligation of any kind entered into, is mere nudum pactum.¹⁸ But, while this is true, the offer is good without consideration until withdrawn.¹⁹ On the other hand, an option agreement, although in its nature unilateral, is as binding upon the part of the optioner as is a bilateral agreement upon the parties thereto, when supported by a valuable consideration,²⁰ whether such consideration is adequate in amount or not.¹ So long as it is supported by a sufficient consideration, the optioner can no more capriciously withdraw or rescind his offer within the time fixed than one of the parties can arbitrarily or without the consent of the other rescind a bilateral contract.² The option becomes functus officio at the moment of the acceptance of the offer. After that event, in other words, it is eliminated from the transaction as an option, and can then serve no purpose except in so far as it discloses and involves the terms of the bilateral agreement arising, ipso facto, upon its acceptance, and, therefore, whether it was supported by a consideration is immaterial.³ Obviously,

See *infra*, § 30, as to effect of acceptance of offer.

18. *Brown v. San Francisco Savings Union*, 134 Cal. 448, 66 Pac. 592; *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136; *Braselton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670; *Howard v. D. W. Hobson Co.*, 38 Cal. App. 445, 176 Pac. 715; *Mitchell v. Gray*, 8 Cal. App. 423, 97 Pac. 160; *Menzel v. Primm*, 6 Cal. App. 204, 91 Pac. 754.

19. *McCowen v. Pew*, 18 Cal. App. 302, 123 Pac. 191.

20. *W. G. Reese Co. v. House*, 162 Cal. 740, 124 Pac. 442; *La Rue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42; *Hall v. Center*, 40 Cal. 63; *Braselton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670; *Rosenberg v. Rogers*, 30 Cal.

App. Dec. 455, 186 Pac. 366; *McCowen v. Pew*, 18 Cal. App. 302, 123 Pac. 191. And see *Stein v. Leeman*, 161 Cal. 502, 119 Pac. 663, holding that option to purchase land was supported by sufficient consideration.

1. *Braselton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670. See *infra*, §§ 113-128, as to sufficiency and adequacy of consideration.

2. *Braselton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670; *McCowen v. Pew*, 18 Cal. App. 302, 123 Pac. 191.

3. *McCowen v. Pew*, 18 Cal. App. 302, 123 Pac. 191, per Hart, J. See, also, *Reed v. Hickey*, 13 Cal. App. 136, 109 Pac. 38 (option to purchase mine).

an option may expire by its own limitation, and thereafter the optionee can claim no rights thereunder.⁴

The rights of the parties to an agreement granting an option to purchase, pending payment or notification of acceptance on the part of the party to whom the option is offered, are not affected by the fact that the subject of the purchase is placed in escrow. There must be a binding contract to support an escrow. One who deposits the subject of an option or offer of sale in escrow may recall it as long as he has the right to revoke his offer of sale.⁵

§ 29. Withdrawal or Rejection of Offer.—The law as applied to the making of contracts permits one making a mere offer to another to withdraw it at any time before it has been accepted by the latter.⁶ “A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.”⁷ This applies although the offer is continuing in nature and is to remain open for a specified time,⁸ unless the promise to hold it

4. *Braselton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670.

5. *Thomas v. Birch*, 178 Cal. 483, 173 Pac. 1102. See *Escrow*.

6. *Roth v. Moeller*, 61 Cal. Dec. 444, 197 Pac. 62 (declaring that an agreement not to revoke a bare offer is not binding); *Wilson v. White*, 161 Cal. 453, 119 Pac. 895 (sale of land without crop); *Russ v. Tuttle*, 158 Cal. 226, 110 Pac. 813 (option); *Bennett v. Potter* (Cal.), 113 Pac. 885 (purchase of automobile); *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897 (order for goods); *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136 (sale of land); *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499 (conveyance of land); *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634 (reward); *Keller v. Ybarra*, 3 Cal. 147

(sale of fruit); *Braselton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670 (option); *Hamlin v. Barnhart*, 26 Cal. App. 632, 147 Pac. 1188 (exchange of real properties); *Berthiaume v. Doe*, 22 Cal. App. 78, 133 Pac. 515 (reward). See *supra*, § 28.

See, also, note in 10 California Law Review, page 80, for discussion of revocability of unilateral offers.

7. Civ. Code, § 1586.

8. *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273. And see *Beckman v. Waters*, 3 Cal. App. 734, 86 Pac. 997, holding that the indefinite extension of the option to purchase property was a privilege given by the owner, which he might revoke upon notice, and that the bringing of the action was a sufficient notice that the option had been terminated.

open is supported by sufficient consideration.* Thus an order for goods is merely an offer or proposal to buy, which is revocable at any time before acceptance of it, or before any reply or notice of the receipt or acceptance of the order is given or communicated to the person giving the order.¹⁰ A party who has been induced by fraud to give an option, terminable at his pleasure, must, if he discovers the true state of facts before the option has by acceptance or payment ripened into a binding contract, exercise his right of revocation, or else be deemed to have waived it.¹¹

“A proposal is revoked: 1. By the communication of notice of revocation by the proposer to the other party, in the manner prescribed by sections fifteen hundred and eighty-one and fifteen hundred and eighty-three, before his acceptance has been communicated to the former; 2. By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance; 3. By the failure of the acceptor to fulfill a condition precedent to acceptance; or, 4. By the death or insanity of the proposer.”¹²

If the proposer dies before his offer is accepted, it is thereby revoked, and cannot afterwards, by any act showing acceptance, be made good as against his estate.¹³ Where an offer is not limited in time the presumption is that it was open at the time of its acceptance on the fifth day after it was made, where nothing to the contrary appears, and it is not necessary that a complaint showing a performance of the offer should allege that it had not been revoked before the performance; the revocation of it, if it had been revoked, is matter of defense.¹⁴

9. See *supra*, § 28.

10. *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897. See SALES.

11. *Thomas v. Birch*, 178 Cal. 483, 173 Pac. 1102. See *infra*, § 39, as to fraud affecting the reality of consent.

12. Civ. Code, § 1587.

13. *Grand Lodge I. O. G. T. v. Farnham*, 70 Cal. 158, 11 Pac. 592.

14. *Wilson v. Stump*, 103 Cal. 255, 42 Am. St. Rep. 111, 37 Pac. 151.

While, unless expressly revoked, an offer will ordinarily remain open for a reasonable time, a rejection relieves the party making it from liability on that offer, and dispenses with the necessity of further revocation; and where an offer has once been rejected, the party rejecting cannot afterwards, at his option, accept the rejected offer, and thus convert the same into an agreement by acceptance. The consent of the party making the original offer must be again manifested, before there can be any contract.¹⁵

§ 30. Necessity for, and Effect of, Acceptance.—It is elementary that, as no contract is complete without the mutual assent of the parties, an offer imposes no obligations until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected the negotiation remains open, and no obligation rests upon either party.¹⁶ And this is as true of a contract for the benefit of a third person as of any other contract.¹⁷ The acceptance is just as much a part of a contract as the proposal. Anything which is a part of the acceptance may be shown in evidence, even though the proposal be in writing and the acceptance be not. It is permissible to show that an offer was accepted with conditions or qualifications, or that, accompanying the acceptance and in reality forming part of it, terms in addition to those set

15. *Niles v. Hancock*, 140 Cal 157, 73 Pac. 840.

16. *Silvers v. Grossman*, 183 Cal. 696, 192 Pac. 534 (accord and satisfaction); *Lawrence v. Premier Indem. Assur. Co.*, 180 Cal. 688, 182 Pac. 431; *Las Palmas etc. Distillery v. Garrett & Co.*, 167 Cal. 397, 139 Pac. 1077 (sale of goods); *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797 (holding further, mere voluntary compliance not sufficient as acceptance); *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58 (accord and satisfaction); *Wiard v. Brown*, 59 Cal.

194 (sale of realty); *Northam v. Gordon*, 46 Cal. 582 (holding action would not lie to recover for performance by offerer, without an acceptance of offer by offeree being shown); *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926 (option); *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 117 Pac. 936 (purchase of goods); *Buttner v. Smith*, 4 Cal. Unrep. 627, 36 Pac. 652 (option). And see cases cited supra, § 24.

17. *More v. Hutchinson*, 34 Cal. App. Dec. 916. See infra, § 279.

forth in the proposal were exacted by the acceptor.¹⁸ Not only must an offer be accepted in order to constitute a contract, but the acceptance thereof must be communicated to the proposer.¹⁹

The acceptance of an offer, without objection or condition, constitutes a binding contract,²⁰ and the acceptance cannot ordinarily be revoked.¹ A contract in the nature of an option becomes mutual and enforceable upon acceptance and tender by the party exercising the option, whether supported by consideration or not,² provided, of course, the election has been exercised within the time specified,³ and performed in the manner prescribed by the agreement.⁴

Each party has a right to rely upon the acceptance as constituting a contract. The party making the offer has a right to understand that the acceptance was according

18. *Lawrence v. Premier Indem. Assur. Co.*, 180 Cal. 688, 182 Pac. 431.

19. *Abbott v. '76 Land & Water Co.*, 6 Cal. Unrep. 25, 53 Pac. 445. See *supra*, § 25.

20. *Russ v. Tuttle*, 158 Cal. 226, 110 Pac. 813; *Los Angeles etc. Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086; *Keller v. Ybarra*, 3 Cal. 147; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926; *Buchtel College v. Chamberloix*, 3 Cal. App. 246, 84 Pac. 1000.

1. *Martyn v. Western Pac. Ry. Co.*, 21 Cal. App. 589, 132 Pac. 602.

2. *Smith v. Post*, 167 Cal. 69, 138 Pac. 705; *W. G. Reese Co. v. House*, 162 Cal. 740, 124 Pac. 42; *Smith v. Bangham*, 156 Cal. 359, 28 L. R. A. (N. S.) 522, 104 Pac. 689; *Levy v. Lyon*, 153 Cal. 213, 94 Pac. 881; *Hay v. Mason*, 141 Cal. 722, 75 Pac. 300; *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; *Kerr*

v. Moore, 6 Cal. App. 305, 92 Pac. 107; *Flickinger v. Heck*, 62 Cal. Dec. 377, 200 Pac. 1045; *Braserton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670; *Stanton v. Singleton*, 6 Cal. Unrep. 189, 54 Pac. 587. See *supra*, §§ 27-28, for general discussion of options.

3. *Kleinecke v. North Confidence Min. & Devel. Co.*, 41 Cal. App. 109, 182 Pac. 313; *W. C. Reese Co. v. House*, 162 Cal. 740, 124 Pac. 442; *Canty v. Brown*, 11 Cal. App. 487, 105 Pac. 428; *Leuschner v. Duff*, 7 Cal. App. 721, 95 Pac. 914; *Buttner v. Smith*, 4 Cal. Unrep. 627, 36 Pac. 652 (holding no acceptance of option); *Decker v. Hughes*, 1 Cal. Unrep. 193.

4. *Flickinger v. Heck*, 62 Cal. Dec. 377, 200 Pac. 1045. See *Briles v. Paulson*, 170 Cal. 408, 149 Pac. 169 (holding option terminated by failure of optionee to comply with conditions).

to the terms of the offer.⁵ On the other hand, an acceptance so made cannot be held to have a binding force beyond the terms of the offer.⁶ But when a proposer expressly acquiesces in an acceptance of an option and treats and recognizes it as of the precise offer which he has made, he waives any objection to it upon the ground that there is a variance from the terms of the offer.⁷ Although a usage may exist between the parties to confirm a contract after acceptance of a proposal, it is competent for the parties to waive or disregard such usage, and it is sufficient that the evidence shows that both parties treated the offer as accepted without confirmation on the part of either.⁸

Determination of place of completion of contract.—A contract is usually considered to be completed at the place where the offer is accepted. If made by exchange of letters or telegrams, it is held to have been made at the place where the letter is mailed, or telegram filed, containing an unconditional acceptance by one party of the offer of the other. If the communications are oral, either with or without the telephone, between parties on opposite sides of a county line, the same principle would seem to require that the contract should be deemed to have been made in the county where the offer of one is accepted by the other.⁹

§ 31. Time for Acceptance.—The time within which an offer must be accepted in order to be operative depends largely upon the circumstances of each particular case. Generally speaking, the acceptance should be within such time as the parties contemplated, at the time of its mak-

5. *Ennis Brown Co. v. W. S. Hurst & Co.*, 1 Cal. App. 752, 82 Pac. 1056. Proc., § 2076; *McCowen v. Pew*, 18 Cal. App. 302, 123 Pac. 191.

6. *Campbell v. Santa Maria Oil etc. Co.*, 153 Cal. 282, 95 Pac. 39; *Hudson v. Barneson*, 41 Cal. App. 633, 183 Pac. 274.

7. Civ. Code, § 1501; Code Civ.

8. *Ennis Brown Co. v. W. S. Hurst & Co.*, 1 Cal. App. 752, 82 Pac. 1056.

9. *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 65 L. R. A. 90, 74 Pac. 855. See *CONFLICT OF LAWS*, vol. 5, pp. 452, 454.

ing, the offer would remain open.¹⁰ Frequently the time for acceptance is limited in the offer. This is usually so in the case of options, and in such a case the acceptance must be within the time specified,¹¹ for time is of the essence.¹² On principle, an offer, when no time for acceptance is specified, may be complied with at any time during its pendency.¹³ But by express provision of the code an acceptance of such an offer to be valid must be signified at once, or within a reasonable time after it is made.¹⁴ A year, or even six months, have been held, as a matter of law, to be an unreasonable time.¹⁵

A written option to purchase goods for the period of one year from a past date and including ten months from the date of the option does not give the optionee one year from the past date in which he may accept; but to render the option binding it must be accepted within a reasonable time, and an acceptance on the last day limited for purchases is not within a reasonable time.¹⁶ Similarly, it was held that an option given to the holder of a promissory note of having the same become due immediately upon default in the payment of the interest as therein provided, in order to be available as against an indorser, must be exercised within a reasonable time after default,

10. *Simons Brick Co. v. Wiglesworth*, 60 Cal. Dec. 613, 193 Pac. 947.

11. *Brown v. San Francisco Savings Union*, 134 Cal. 448, 66 Pac. 892; *Phillips v. Deck*, 76 Cal. 384, 18 Pac. 336 (acceptance held to have been made in reasonable time). See *supra*, §§ 27, 28, 30.

12. *Vassault v. Kirby*, 1 Cal. Unrep. 668. See *infra*, §§ 211-214, as to time as essence of contracts generally.

13. *State Loan etc. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600.

14. Civ. Code, § 1587, subd. 2; *McManaman v. Vickery*, 29 Cal. App. Dec. 104, 183 Pac. 229; *Niles*

v. Hancock, 140 Cal. 157, 73 Pac. 840; *Boyd v. Brinckin*, 55 Cal. 427. Supporting this rule see *Simons Brick Co. v. Wiglesworth*, 60 Cal. Dec. 613, 193 Pac. 947. And see *Clovis Fruit Co. v. California Wine Assn.*, 40 Cal. App. 623, 181 Pac. 229 (holding evidence failed to show option to cancel certain contracts was not exercised within reasonable time).

15. *Roberts v. Evans*, 43 Cal. 380; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938.

16. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938.

and that a delay of seven months before attempting to exercise the option was unreasonable.¹⁷

What is a reasonable time within which to accept an offer to purchase is a question of law for the court.¹⁸ A letter of acceptance sent after the lapse of a reasonable time is properly excluded from evidence.¹⁹

§ 32. Mode of Acceptance.—When the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, assent in any other mode will not be presumed.²⁰ But where no condition is provided by the proposer concerning the communication of the acceptance, any reasonable and usual mode may be adopted, and consent will be deemed to have been fully communicated between the parties as soon as the acceptance is put in the course of transmission,¹ and beyond the control of the party accepting.² A telegram accepting an offer takes effect on its deposit for transmission.³ And it seems to be settled that when the proposal is unconditionally accepted by a letter deposited in the mail properly addressed to the proposer the contract is complete.⁴ But when the acceptance is not sent by mail to the proposer, but to an agent of the acceptor, it is clearly within the

17. *Crossmore v. Page*, 73 Cal. 213, 2 Am. St. Rep. 789, 14 Pac. 787.

18. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938. See *infra*, § 209, for discussion of what constitutes reasonable time for performance of contract.

19. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938.

20. *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797. See, also, *infra*, § 33.

1. Civ. Code, §§ 1582, 1583; *Wilson v. White*, 161 Cal. 453, 119 Pac. 895; *American Can Co. v. Agricul-*

tural C. Co., 27 Cal. App. 647, 150 Pac. 996; *Vassault v. Kirby*, 1 Cal. Unrep. 668.

2. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926.

3. *Humphrey v. Farmers' Union & Milling Co.*, 32 Cal. App. Dec. 35, 190 Pac. 489.

4. *Grover v. Western Union Telegraph Co.*, 31 Cal. App. Dec. 158, 187 Pac. 973; *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 315, 74 Pac. 855; *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926. See note in 9 A. L. R., p. 386, for discussion of withdrawal of, or right to withdraw, letter from mail as affecting consummation of contract.

control of the latter until actual delivery by his agent, and hence is not binding until such delivery.⁵ In the absence of anything to put the offerer on inquiry, he has an absolute right to rely upon a telegram containing an acceptance as correct, and to act upon it.⁶

§ 33. Agreement to be Reduced to Writing.—When it is a part of an understanding between parties that the terms of the contract are to be reduced to writing and signed by them, assent to its terms must be evidenced in the manner agreed upon, else it does not become a binding or complete contract.⁷ This is especially true when the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other.⁸ In such a case the doctrine that acceptance of an offer is indicated by a performance of the conditions thereof⁹ does not apply. The fact that the party not signing the contract proceeds with full knowledge of its terms partially to perform it does not estop him to assert that there is no binding obligation. Estoppel must be mutual, and the party failing to sign the contract cannot be estopped by a voluntary compliance with a part of its conditions, where the party signing the same cannot be held bound under the proposed contract, but

5. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926. See *Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L. R. A. (N. S.) 787, 126 Pac. 153 (holding rule inapplicable as nothing more than mere offer was mailed). See *infra*, § 155, as to delivery of contract.

6. *Germain Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, 59 L. R. A. 575, 70 Pac. 658.

7. *Mercantile Trust Co. v. Sunset etc. Co.*, 176 Cal. 461, 168 Pac. 1037; *Las Palmas etc. Distillery v. Garrett*, 167 Cal. 397, 139 Pac. 1077; *Spinney v. Downing*, 108 Cal. 666,

41 Pac. 797; *Pacific R. & M. Co. v. Riverside etc. Ry. Co.*, 90 Cal. 627, 27 Pac. 525; *Sam Aftergut Co. v. Mulvihill*, 25 Cal. App. 784, 145 Pac. 728; *Connor v. Plank*, 25 Cal. App. 516, 144 Pac. 295; *Wiener v. H. Graff & Co.*, 7 Cal. App. 580, 95 Pac. 167 (but holding intent to have both parties sign did not appear). See *infra*, §§ 147-160, as to formal requisites of contracts.

8. *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797; *Sam Aftergut Co. v. Mulvihill*, 25 Cal. App. 784, 145 Pac. 728.

9. See *infra*, §§ 34, 36.

may repudiate it at any time. A mere voluntary compliance with the conditions by one who had not previously assented to it does not render the other liable on it.¹⁰ This does not mean, however, that a contract already reduced to writing, and signed, is of no binding force merely because it contemplates a subsequent and more formal instrument, as the repository of its terms.¹¹

§ 34. Conduct Signifying Acceptance.—Although an acceptance is usually made by express declaration, or by unequivocal acts, as by signing the contract,¹² it may be inferred from conduct.¹³ Thus, the receipt and acceptance by one party of a paper signed by the other only, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper.¹⁴

“Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal.”¹⁵

There is privity of contract between the offerer and offeree from the time the latter accepts the consideration moving to him under the contract.¹⁶ It is also the rule that

10. *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797. See *ESTOPPEL*.

11. *Levin v. Saroff*, 36 Cal. App. Dec. 214 (lease); *Nash v. Kreling*, 6 Cal. Unrep. 238, 56 Pac. 262. See *infra*, §§ 147-160, as to formal requisites of contracts.

12. *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978.

13. Civ. Code, § 1581. As to implied assent to account stated, see *ACCOUNTS AND ACCOUNTING*, vol. 1, p. 197.

14. *Fidelity etc. Co. v. Fresno Flume etc. Co.*, 161 Cal. 466, 37 L. R. A. (N. S.) 322, 119 Pac. 646;

Cunningham v. International Committee of Y. M. C. A., 34 Cal. App. Dec. 575, 197 Pac. 140 (holding that the rule applies regardless of whether the acceptor reads the document or otherwise informs himself of its contents); *Frankfort etc. Co. v. California etc. Co.*, 28 Cal. App. 74, 151 Pac. 176.

15. Civ. Code, § 1584. See *infra*, § 36.

16. *Richmond Wharf & Dock Co. v. Blake*, 181 Cal. 454, 185 Pac. 184; *Bennett v. Potter (Cal.)*, 113 Pac. 885.

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."¹⁷

But this doctrine applies only to a transaction to which the person accepting the benefit is, or purports to be, or is claimed to be, a party, but who would not have been bound by the transaction if he had not accepted the benefit thereof.¹⁸ It is applicable to an assignee only when all the benefits of a full performance by the vendor have inured to the assignee.¹⁹ The assignee of a contract who receives the assignment as collateral security for money loaned does not accept the benefit of the original contract otherwise than as pledgee, and does not become a party to the original contract, nor obligate himself to pay for work done under the contract.²⁰ And it is clear that the mere retention and use of the benefit resulting from work,

17. Civ. Code, §§ 1589, 3521; Barlow v. Frink, 171 Cal. 165, 152 Pac. 290 (contract for benefit of third person); White v. Stevenson, 144 Cal. 104, 77 Pac. 828 (mortgage); Simons v. Bedell, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3 (conveyance of realty); Thomasson v. Grace M. E. Church, 113 Cal. 558, 45 Pac. 838 (but holding doctrine inapplicable as defendant had not received or accepted benefits); Borel v. Rollins, 30 Cal. 408 (decided prior to enactment of code provision but recognizing rule); Doolittle v. Savage Tire Co., 33 Cal. App. 476, 165 Pac. 728 (action to recover compensation for use of automobile in connection with services rendered corporation); Guernsey v. Johnson Organ etc. Co., 29 Cal. App. 699, 157 Pac. 527 (holding rule inapplicable); Boyd v. Big Three Ranch Co., 22 Cal. App. 108, 133 Pac. 623; Newhall v.

Joseph Levy Bag Co., 19 Cal. App. 9, 124 Pac. 875 (contract of corporation signed only by secretary); Northern Assurance Co. v. Stout, 16 Cal. App. 548, 117 Pac. 617; Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141 (action by attorney to recover for services rendered); Colpe v. Jubilee Min. Co., 2 Cal. App. 393, 84 Pac. 324. See AGENCY, vol. 1, p. 683; ASSIGNMENTS, vol. 3, p. 230; CORPORATIONS.

18. Canale v. Copello, 137 Cal. 22, 69 Pac. 698; Stone v. Owens, 105 Cal. 292, 38 Pac. 726; Beazley v. Embree, 41 Cal. App. 706, 183 Pac. 298.

19. Wilson v. Beazley, 62 Cal. Dec. 78, 199 Pac. 772 (citing Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979).

20. Stone v. Owens, 105 Cal. 292, 38 Pac. 726. See ASSIGNMENTS, vol. 3, p. 277 et seq; PLEDGE.

where no power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment.¹ It has been further declared that this rule has application only where the statute does not specify the character of the contract requisite to liability.²

§ 35. Sufficiency of Acceptance.—An acceptance, to be good, must of course be such as to conclude an agreement or contract between the parties. The rules for determining whether or not a proposal and acceptance constitute a binding contract have been clearly laid down. There must be a proposal squarely assented to. The acceptance must in every respect correspond with the offer, neither falling with nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated,³ unless the offerer has, by conduct

1. *Zottman v. San Francisco*, 20. Cal. 96, 81 Am. Dec. 96. See *WORK, LABOR AND MATERIALS*.

2. *Boyd v. Big Three Ranch Co.*, 22 Cal. App. 108, 133 Pac. 623.

3. Civ. Code, § 1580; *Hunkins-Willis Co. v. Los Angeles etc. Co.*, 155 Cal. 41, 99 Pac. 369 (sale of goods); *German Sav. & L. Co. v. McLellan*, 154 Cal. 710, 99 Pac. 194 (sale of land); *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 68 L. R. A. 226, 79 Pac. 366 (sale of oil); *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53 (sale of realty); *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840 (sale of land); *Brown v. San Francisco Sav. Union*, 134 Cal. 448, 66 Pac. 592 (holding no such acceptance shown before withdrawal of offer); *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797; *Talmadge v. Arrowhead E. Co.*, 101

Cal. 367, 35 Pac. 1000 (sale of land); *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897 (sale of goods); *Smith v. Occidental & O. S. S. Co.*, 99 Cal. 462, 34 Pac. 84 (release); *Pacific Rolling Mill Co. v. Railway Co.*, 90 Cal. 627, 27 Pac. 525 (purchase of street railway); *Yore v. Bankers' etc. Life Assn.*, 88 Cal. 609, 26 Pac. 514; *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707 (sale of realty); *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136 (sale of land); *Dolan v. Scanlan*, 57 Cal. 261 (contract for services of broker); *Los Angeles I. & L. Co-op. Assn. v. Phillips*, 56 Cal. 539 (sale of land); *Masten v. Griffing*, 33 Cal. 111; *Azevedo v. Davidson*, 33 Cal. App. Dec. 279, 193 Pac. 594 (declaring correspondence did not show concluded contract); *Humphrey v.*

or otherwise, waived certain conditions of his offer.⁴ It is not essential to the acceptance of a proposal, however, that use should be made of the identical language found in the proposal. Any form of expression showing clearly an intention to accept on the terms proposed, or to consent to the same subject matter in the same sense, is sufficient if coupled with no new conditions.⁵

An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting.⁶ For, while a mere requested modification of an offer does not constitute a rejection of it,⁷ a proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer, and itself constitutes a new offer,⁸ which,

Farmers' Union & Milling Co., 32 Cal. App. Dec. 35 (holding there was a meeting of the minds of the parties upon the same terms and conditions, excepting one which the law would imply in any event); Cooper v. Stansbury, 28 Cal. App. 444, 152 Pac. 948 (exchange of property); Wolf & Co. v. King & Starrett, 1 Cal. App. 749, 82 Pac. 1055 (sale of crops); Buttner v. Smith, 4 Cal. Unrep. 627, 36 Pac. 652 (option); Johnson-Locke M. Co. v. Howard, 6 Cal. Unrep. 748, 65 Pac. 953 (holding evidence showed contract).

4. Gallway v. Galbreath, 30 Cal. App. Dec. 917, 187 Pac. 73.

5. Ennis Brown Co. v. W. S. Hurst & Co., 1 Cal. App. 752, 82 Pac. 1056.

6. Civ. Code, § 1585; Hunkins-Willis Co. v. Los Angeles etc. Co., 155 Cal. 41, 99 Pac. 369; Four Oil Co. v. United Oil Producers, 145 Cal. 623, 68 L. B. A. 226, 79 Pac. 366; Niles v. Hancock, 140 Cal. 157, 73 Pac. 840; Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897; Pacific etc. Co. v.

Riverside etc. Ry. Co., 90 Cal. 627, 27 Pac. 525; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Boyd v. Brinkin, 55 Cal. 427; Wolf & Co. v. King & Starrett, 1 Cal. App. 749, 82 Pac. 1055; Johnson-Locke M. Co. v. Howard, 6 Cal. Unrep. 748, 65 Pac. 953. See note in 1 A. L. R., p. 1508, for discussion of effect of acceptance of offer with condition which law would imply.

7. Berthiaume v. John Doe, 22 Cal. App. 78, 133 Pac. 515.

8. Civ. Code, § 1585; McRae v. Ross, 170 Cal. 74, 148 Pac. 215; Wilson v. White, 161 Cal. 453, 119 Pac. 895; Hunkins-Willis Co. v. Los Angeles etc. Co., 155 Cal. 41, 99 Pac. 369; Four Oil Co. v. United Oil Producers, 145 Cal. 623, 68 L. B. A. 226, 79 Pac. 366; Niles v. Hancock, 140 Cal. 157, 73 Pac. 840; Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897; Meux v. Hogue, 91 Cal. 442, 27 Pac. 744; Woody v. Bennett, 88 Cal. 241, 26 Pac. 111; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Breckinridge v. Crocker, 78 Cal. 529,

if not accepted in turn on the part of the first offerer, becomes null;⁹ but if such counter-proposal is accepted by the original offerer, a binding contract is concluded.¹⁰ A party who submits a counter-proposition instead of accepting an offer may not abandon the substitute and accept the original offer without the other party's consent.¹¹

It is for the court to determine whether letters which have passed between the parties constitute an agreement between them.¹² And, of course, the burden is on the party seeking to enforce a contract to show its existence.¹³

§ 36. Unilateral and Bilateral Contracts.—Having reference to the obligation imposed, contracts are classified as unilateral and bilateral. Those of the former class are characterized by an act given in exchange for a promise, while the latter consist in a promise given for a promise.

21 Pac. 179; *Masten v. Griffing*, 33 Cal. 111; *Alexander v. Bosworth*, 26 Cal. App. 589, 147 Pac. 607; *Bettens v. Hoover*, 12 Cal. App. 313, 107 Pac. 329; *Wolf & Co. v. King & Starrett*, 1 Cal. App. 749, 82 Pac. 1055.

9. *Cooper v. Stansbury*, 28 Cal. App. 444, 152 Pac. 948.

10. *Wilson v. White*, 161 Cal. 453, 119 Pac. 895; *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329.

11. *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840.

12. *Hunkins-Willis etc. Co. v. Los Angeles etc. Co.*, 155 Cal. 41, 99 Pac. 369 (letters did not constitute a proposal squarely assented to); *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 68 L. R. A. 226, 79 Pac. 366; *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840; *Brown v. San Francisco Savings Union*, 134 Cal. 448, 66 Pac. 592; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897; *Pacific etc. Co. v. Riverside etc. Ry.*

Co., 90 Cal. 627, 27 Pac. 525 (correspondence contemplated making of formal agreement); *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136; *Azevedo v. Davidon*, 33 Cal. App. Dec. 279, 193 Pac. 594 (correspondence indicating that negotiations were not to be considered closed until certain investigations should be made); *Marx & Rawolle v. Standard Soap Co.*, 42 Cal. App. 32, 183 Pac. 225 (correspondence did not show completed contract); *Ennis Brown Co. v. Hurst & Co.*, 1 Cal. App. 752, 82 Pac. 1056; *Wolf & Co. v. King & Starrett*, 1 Cal. App. 749, 82 Pac. 1055; *Johnson-Locke Mercantile Co. v. Howard*, 6 Cal. Unrep. 748, 65 Pac. 956 (correspondence concerning sale of raisin crop considered and held to amount to contract); *Cole v. Mugridge*, 36 Cal. App. 179, 171 Pac. 827 (correspondence showed contract).

13. *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840. See *infra*, § 285.

There is a radical distinction in regard to communication of acceptance of an offer which requires the offeree to do something, and one which requires the offeree to promise something. In the former case, communication of notice of acceptance is ordinarily not required, but compliance with the condition of the offer by doing the act in the way prescribed is ordinarily sufficient evidence of the acceptor's assent, and it is not necessary to show that he notified the offerer that he accepted it and would perform the condition.¹⁴

Where an absolute unconditional representation of something to be done in the future is made, in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the act by which the intended result is obtained, a contract is thereby concluded between the parties.¹⁵ For example, when a party publishes an offer to the world, as in the case of the offer of a reward, and before it is withdrawn another acts upon it, the party making the offer is bound to perform his promise. The offer is made to no person in particular; but when the act upon which it depends is performed, the offer and the act combined make a complete contract between the person making the offer and the person who performs the act.¹⁶ This rule, however, is subject to the qualification that the person performing the act must have been aware of the offer and acted in reliance upon it. If he did not do the acts upon which he bases his right to recover, with the intention of claiming the reward in the event of his accomplishing what would entitle him to it, he cannot recover it.¹⁷

14. Civ. Code, § 1584; *Los Angeles etc. Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086; *State Loan etc. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Baird v. Loeschier*, 9 Cal. App. 65, 98 Pac. 49.

15. *Boyd v. Brinekin*, 55 Cal. 427 (offer to settlers).

16. *Wilson v. Stump*, 103 Cal. 255, 42 Am. St. Rep. 111, 37 Pac. 151; *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *Berthiaume v. Doe*, 22 Cal. App. 78, 133 Pac. 515. See REWARDS.

17. *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65.

An offer by a party to perform services for another party, provided he complies with certain conditions named in the offer, does not create a contract unless the conditions are complied with by the other party.¹⁸ And if the party making the offer performs the services, relying alone on the promise of the other party to comply with the conditions, an action will not lie on the proposed contract to recover for the services performed.¹⁹

If, however, an offer calls for a promise, performance of the acts involved without the promise itself being made, does not constitute an acceptance.²⁰ There must be a definite declaration by the offeree expressing his intention to be bound, and which has the effect of obligating him to perform his side of the agreement. Moreover, where the acceptor by merely accepting has really himself promised nothing in return, so that, although one party is bound the other is not, the engagement lacks what is called mutuality and is not enforceable.¹

Reality.

§ 37. Duress and Menace.—The consent of a party to a contract must be free, and it is not free when obtained through duress or menace.² Duress signifies a condition of mind produced by improper external pressure of influence

18. *Northam v. Gordon*, 46 Cal. 582; *Alexander v. Bosworth*, 26 Cal. App. 589, 147 Pac. 607; *O'Brien v. Garibaldi*, 15 Cal. App. 518, 115 Pac. 249.

19. *Northam v. Gordon*, 46 Cal. 582.

20. *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897.

1. *Hamlin v. Barnhart*, 26 Cal. App. 632, 147 Pac. 1188; *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 117 Pac. 934. See

infra, §§ 139-141, as to mutuality of obligation and remedy of contracts.

2. Civ. Code, § 1567, subds. 1, 2; *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Merchants Collection Agency v. Roantree*, 37 Cal. App. 88, 173 Pac. 600; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938; *Harlan v. Gladding, McBean & Co.*, 7 Cal. App. 49, 93 Pac. 400. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 756, as to actions for rescission of contracts on ground of duress. And see DEEDS.

which practically destroys free agency and causes one to do an act or make a contract not of his own volition, but under such pressure, and it is to be determined by all the attendant facts and circumstances.³ It consists, according to section 1569 of the Civil Code, in

“1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband or wife; 2. Unlawful detention of the property of any such person; or, 3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.”

“Menace” is defined by section 1570, Civil Code. It consists of a threat of such duress as is specified in section 1569, subdivision 1, and of unlawful and violent injury to the person and property of any such person or injury to his character.⁴ However, it does not follow that a contract induced by duress or menace is void, as section 1566 of the Civil Code provides that

“A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission.”⁵

The Civil Code in defining such duress or menace as will avoid an agreement embraces the element of unlawfulness in its definition of these terms.⁶ And conceding that courts recognize what may be termed moral duress under some circumstances, there is always some element of illegality in the demand complained of, some denial of a right, some unfounded claim, some extortion as a condition to the exercise by the party of a legal right.⁷ A threat to refuse performance of a contract cannot be made

3. *Harlan v. Gladding, McBean & Co.*, 7 Cal. App. 49, 93 Pac. 400, per Burnett, J.

4. See, also, *THREATS*.

5. *Harlan v. Gladding, McBean & Co.*, 7 Cal. App. 49, 93 Pac. 400. See *CANCELLATION OF INSTRUMENTS*, vol. 4, p. 756.

6. *Kramer v. Board of Police Commrs.*, 39 Cal. App. 396, 179 Pac. 216.

7. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938, per Chipman, J.

the predicate of legal duress.⁸ And the mere threat to withhold from a party a legal right which he has an adequate remedy to enforce is not, in the eyes of the law, duress—certainly not such as avoids the execution of a contract.⁹ Nor is an agreement void for duress merely because one of the parties was financially embarrassed and the other party took advantage of such necessity to obtain a promise to pay a debt which was actually owed.¹⁰ Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them, but refuses to surrender them unless the exaction is endured.¹¹

§ 38. Resort to Process.—It is not legal duress to threaten or actually to take advantage of the usual remedy by suit for the enforcement of a debt or obligation; and this is true even if the claim be illegal.¹² Standing upon one's legal rights for the protection thereof cannot be recognized as coercion, intimidation or undue influence of any other person.¹³ But the law does not contemplate the use of criminal process as a means of collecting a debt. To invoke such process for the purpose named is, as held

8. *Taylor v. Ford*, 131 Cal. 440, 63 Pac. 770; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938.

9. *Taylor v. Ford*, 131 Cal. 440, 63 Pac. 770 (holding the threat of a partner to sell his interest to a stranger in violation of the contract for a five years' partnership does not amount in law to coercion of a purchase made by his copartner, and is not a defense to a note given therefor); *Tisdale v. Bryant*, 38 Cal. App. 750; 177 Pac. 510; *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938 (where one de-

manded right to purchase boxes at an alleged contract price, but sale was refused except at a higher rate, fact that it was impossible to buy boxes elsewhere did not render payment of higher price coercion).

10. *Tisdale v. Bryant*, 38 Cal. App. 750, 177 Pac. 510.

11. *Harlan v. Gladding, McBean & Co.*, 7 Cal. App. 49, 93 Pac. 400.

12. *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733; *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891.

13. *Cortelyou v. Vogel*, 34 Cal. App. Dec. 820, 197 Pac. 968; *Murray v. Murray*, 28 Cal. App. 533, 153 Pac. 248.

by all authorities, contrary to public policy.¹⁴ A threat of arrest and imprisonment, made for unlawful purposes, constitutes menace, within the meaning of section 1570 of the Civil Code. Thus, a contract and promissory notes executed under coercion and intimidation, resulting from threats of arrest and imprisonment, in favor of one who, for the purpose of frightening and intimidating the party executing the papers, and not for the purpose of convicting him of any crime, procured a warrant for his arrest upon a charge of embezzlement, are against public policy and void, as having been obtained by an abuse of criminal process.¹⁵ However, it has been held that promissory notes executed to cover a shortage in his accounts, by the manager of a corporation, who was under a bond for the faithful discharge of his duties, were not rendered illegal or void by a mere threat of the corporation, within its rights, that if the shortage were not settled, it would be recovered upon his official bond, unaccompanied by any threat of arrest or of prosecution for embezzlement. The mere fact that the manager feared prosecution by the bonding company could not affect the legality of the consideration. No threat of criminal prosecution can be implied in such a case.¹⁶

§ 39. Fraud.—Although the sections of the Civil Code defining fraud are found in the chapter on “Consent,” they are general in terms, and refer to all fraud whether perpetrated in inducing persons to contract or for other purposes.¹⁷ In consequence, the decisions and statutes dealing with fraud as affecting contracts, as well as its

14. *People v. Beggs*, 178 Cal. 79, 172 Pac. 152; *Merchants' Collection Agency v. Roantree*, 37 Cal. App. 88, 173 Pac. 600.

15. *People v. Beggs*, 178 Cal. 79, 172 Pac. 152; *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Merchants' Collection*

Agency v. Roantree, 37 Cal. App. 88, 173 Pac. 600.

16. *Murray Showcase etc. Co. v. Sullivan*, 15 Cal. App. 475, 115 Pac. 259. As to abuse of process generally, see *PROCESS*.

17. *In re Kohler*, 79 Cal. 313, 21 Pac. 758.

effect generally, are treated in detail in other articles.¹⁸ It suffices at this point to note that consent to a contract is not real or free when obtained through fraud.¹⁹ By express provision of the Civil Code consent is deemed to have been obtained through fraud "only when it would not have been given had such cause not existed."²⁰ This does not mean, however, that a misrepresentation must be the sole cause of the contract, but it must be of such nature, weight and force that the court can say "without it the contract would not have been made."²¹

Fraud is either actual or constructive.² Actual fraud is defined in section 1572 of the Civil Code. It lies in the commission of one or another of the enumerated acts done "by a party to the contract . . . with intent to deceive another party thereto or to induce him to enter into the contract."³ Constructive fraud is defined by section 1573 of the Civil Code. The burden of proof usually rests upon the persons asserting fraud, but when one bases a claim upon a contract obtained from a person to whom he stands in a relation of trust and confidence, it becomes his task to prove that he exhibited that uberrima fides which removes all doubt respecting the fairness of the contract.⁴ Although neither party is precluded from showing fraud that might vitiate an apparent contract, the fraud must, in order to accomplish the vitiation, relate to and be connected with the agreement which is the basis of the action.⁵

18. See FRAUD AND DECEIT. See, also, CANCELLATION OF INSTRUMENTS, vol. 4, p. 756, as to actions for rescission of contracts on ground of fraud. And see DEEDS.

19. Civ. Code, § 1567.

20. Civ. Code, § 1568; Craig v. Shea, 59 Cal. Dec. 273, 31 Cal. App. Dec. 95, 188 Pac. 73; Elliott v. Southern Pacific Co., 145 Cal. 441, 68 L. R. A. 393, 79 Pac. 420.

1. Craig v. Shea, 59 Cal. Dec.

273, 31 Cal. App. Dec. 95, 188 Pac. 73, per Wood, J., pro tem.

2. Civ. Code, § 1571.

3. Harding v. Robinson, 175 Cal. 534, 166 Pac. 808.

4. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Mead v. Mead, 41 Cal. App. 280, 182 Pac. 761. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 770 et seq.; DEEDS; FRAUD AND DECEIT.

5. Yuba Mfg. Co. v. Stone, 39 Cal. App. 440, 179 Pac. 418.

§ 40. Undue Influence.—There is another consideration which is sufficient to justify setting aside a contract. It is embraced within the provisions of section 1575 of the Civil Code and is denominated “undue influence.”⁶ Undue influence has been defined to be that kind of influence or supremacy of one mind over another by which that other is prevented from acting according to his own wish or judgment.⁷ It is any improper or wrongful constraint, machination, urgency or persuasion whereby the will of a person is overborne and he is induced to do or forbear to do an act which he would not do, or would do, if left to act freely.⁸ Or, as the Civil Code defines it:

“Undue influence consists—1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another’s weakness of mind; or 3. In taking a grossly oppressive and unfair advantage of another’s necessities or distress.”⁹

Undue influence and fraud are not identical. The one has reference to the subjugation of the will, the other to a deception.¹⁰ Slight evidence of undue influence is insufficient to establish it. The influence must amount to coercion, destroying free agency as to the very act, and the exertion of undue influence upon the very act must be proved.¹¹ Undue influence being established as a fact, any contract obtained or other transaction accomplished

6. Carr v. Sacramento Clay Products Co., 35 Cal. App. 439, 170 Pac. 446. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 777, as to actions to rescind contracts on ground of undue influence. See, also, DEEDS; WILLS.

7. Estate of Ingram, 1 Cal. Prob. Dec. 222.

8. Estate of Olson, 19 Cal. App. 379, 126 Pac. 171, per Chipman, J.

9. Civ. Code, § 1575; Dimond v.

Sanderson, 103 Cal. 97, 37 Pac. 189; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; Carr v. Sacramento Clay Products Co., 35 Cal. App. 439, 170 Pac. 446; Estate of Olson, 19 Cal. App. 379, 126 Pac. 171.

10. Estate of Ricks, 160 Cal. 467, 117 Pac. 539.

11. Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; Goodwin v. Goodwin, 59 Cal. 560; Ford v. Ford, 30 Cal. App. Dec. 611, 186 Pac. 164.

by its means is voidable, and is set aside without the necessary aid of any presumption.¹² The question whether there has been an undue advantage—an unconscionable exercise of a superior power—depends largely upon the situation of the parties at the time of the negotiations.¹³

§ 41. Mental Condition.—Where there is no coercion amounting to duress, but a transaction is the result of a moral, social or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law.¹⁴ So wherever there is great weakness of mind in a person executing a conveyance arising from age, sickness or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, imposition or undue influence will be inferred, and a court of equity will, upon proper and reasonable application of the injured party, interfere and set the conveyance aside.¹⁵

Soundness of mind and body does not, however, imply immunity from undue influence. It may require greater ingenuity to influence unduly a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind. But, it has been said, history and experience teach that the minds of strong men and women have often been overborne, and they have been by a master mind persuaded to consent to what in their normal moments, and free from undue influence, they would not

12. *Espinosa v. Stuart*, 35 Cal. App. Dec. 102, 199 Pac. 66 (quoting from *Pomeroy's Equity Jurisprudence*).

13. *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16.

14. *Espinosa v. Stuart*, 35 Cal. App. Dec. 102, 199 Pac. 66 (quoting from *Pomeroy's Equity Jurisprudence*).

15. *Klose v. Hillenbrand*, 88 Cal. 473, 26 Pac. 352; *Richards v. Donner*, 72 Cal. 207, 13 Pac. 584; *Moore*

have done.¹⁶ Upon the issue of undue influence, evidence of mental condition is admissible.¹⁷

A plaintiff who seeks to avoid a contract pleaded by the defendant in his answer, on account of undue influence and unfair advantage taken of weakness of mind, is not required to plead such matter of avoidance, in order to prove the same; and an instruction upon that subject, if based upon evidence sufficient to warrant it, is not outside of the issues. Under our system of pleading, the plaintiff is not required to reply to any new matter or affirmative defense set up in the answer, but may meet it by any competent proof.¹⁸

§ 42. Confidential Relations — Presumption.—The rule has been declared to be inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon terms of his own making; that in every such transaction the law will presume that he who held an influence over the other exercised it unduly to his own advantage; that the transaction will not be upheld, unless it be shown that such other had independent advice, and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect.¹⁹ The conduct of the party benefited

v. Moore, 56 Cal. 89. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 782; DEEDS.

16. Estate of Olson, 19 Cal. App. 379, 126 Pac. 171. See WILLS.

17. Civ. Code, § 1575, subd. 2; Camp v. Boyd, 41 Cal. App. 83, 182 Pac. 60; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Estate of Welch, 6 Cal. App. 44, 91 Pac. 336. See WILLS.

18. Rankin v. Sisters of Mercy, 82 Cal. 88, 82 Pac. 1134. See PLEADING.

19. Civ. Code, § 1575, subd. 1;

Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189; Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306; Espinosa v. Stuart, 35 Cal. App. Dec. 102, 199 Pac. 66; Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348. And see CANCELLATION OF INSTRUMENTS, vol. 4, p. 778 et seq., as to judicial rescission of contracts

must be such as to sever the connection and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage save only whatever kindness or favor may have arisen out of the connection.²⁰ The single circumstance to be considered is the existence of some fiduciary relation, some relation of confidence subsisting between two parties. No mental weakness, old age, ignorance, pecuniary distress and the like is assumed as an element of the transaction; if any such fact be present it is incidental, not necessary,—immaterial, not essential.¹

It has been said that there is no reason, either in equity or law, why a person of perfect mental capacity, acting freely and voluntarily, who is sick with mortal illness, is not entirely competent to make a voluntary conveyance of his property as fully and completely as when in perfect health, even though such conveyance should seem to others unreasonable, unjust and unnatural.² Great age alone furnishes no presumption that a grantor was incapable of understanding the nature of the transaction, or that he was incapable of resisting the power of the grantee.³ It is not a question of physical condition, of pain or absence of pain, of long life or short life, but it is a question of mental capacity and the free and untrammelled action of the mind.⁴

Proof of injury.—As an essential element of the rule under consideration is that one person has suffered some injury through the abuse of confidence by another, that fact, it would seem, must be alleged and proved. It must be made to appear that the relationship was used to ob-

when confidence has been abused. See, also, *DEEDS*.

20. *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Conner v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306; *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348.

1. *Espinosa v. Stuart*, 35 Cal. App. Dec. 102, 199 Pac. 66, per

Sturtevant, J. (quoting from *Pomeroy's Equity Jurisprudence*).

2. *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599. See *DEEDS*.

3. *Rogers v. Scott*, 28 Cal. App. 93, 151 Pac. 379.

4. *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599.

tain an unfair advantage, or that confidence was violated.⁵ If it were enough to show that a contract was entered into during the relationship, and that thereupon the presumption would arise that it was fraudulent, it would follow, it has been argued, either that all contracts between an attorney and client or physician and patient are voidable, or that a party is entitled to relief on the ground of fraud without showing that damage resulted therefrom.⁶

What is confidential relation.—A “confidential relation” is ordinarily synonymous with a “fiduciary relation” and it may be defined to be any relation wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where confidence is reposed by one person in the integrity of another.⁷ No such relation, however, is presumed to exist between brother and sister merely because of their blood relationship. While it is true that such relationship is a material circumstance to be considered in determining whether or not a confidential relation actually existed, nevertheless the mere fact that the parties are brother and sister does not, in and of itself, create a confidential relation.⁸

§ 43. Application of Rule.—The rule that undue influence is presumed when confidential relations exist between parties to a contract finds application with peculiar force in a case where the effect of the transaction is to divert an estate from those who, by the ties of nature, would be its

5. *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Cole v. Wolfskill*, 32 Cal. App. Dec. 1104, 192 Pac. 549.

6. *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Cole v. Wolfskill*, 32 Cal. App. Dec. 1104, 192 Pac. 549, per *Weller, J.*

7. *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384; *Payne*

v. Payne, 12 Cal. App. 251, 107 Pac. 148. See, also, *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599 (holding evidence failed to show undue influence in conveyance by sister to brother). See CANCELLATION OF INSTRUMENTS, vol. 4, p. 778 et seq.; DEEDS.

8. *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555; *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384.

natural recipients, to the person through whose influence the diversion is made, whether such diversion be for his own personal advantage, or for the advantage of some interest of which he is the representative.⁹ It has been more frequently applied to transactions between attorney and client,¹⁰ or guardian and ward,¹¹ than to any other relation; but the rule itself has its source in principles which govern all confidential relations.¹² It applies to transactions between parent and child,¹³ husband and wife,¹⁴ trustee and beneficiary,¹⁵ physician and patient,¹⁶ and between a person and his spiritual adviser.¹⁷ But the rule is less stringent where it appears that a trustee was not advising the beneficiary in the conduct of business, but assumed a hostile attitude, and was urging the payment of a debt due himself;¹⁸ or where an attorney openly assumes a hostile attitude to his client. Nor is it applicable to a contract by which the relation of attorney and client is originally created and the compensation of the attorney fixed. The confidential relation does not exist until such

9. *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785.

10. *Metropolis Trust & Sav. Bank v. Monnier*, 169 Cal. 592, 147 Pac. 265; *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981; *Id.*, 168 Cal. 120, 142 Pac. 83; *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Espinosa v. Stuart*, 35 Cal. App. Dec. 102, 199 Pac. 66. As to attorneys' dealings with client, see *ATTORNEYS AT LAW*, vol. 3, p. 622 et seq.

11. *Brown v. Burbank*, 64 Cal. 99, 27 Pac. 940. See *GUARDIAN AND WARD*.

12. *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785. See *CANCELLATION OF INSTRUMENTS*, vol. 4, p. 780.

13. *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; affirmed, 106 Cal. 1, 39 Pac. 39; *Becker v. Schwerdtle*, 6 Cal. App. 462, 92 Pac.

398. But see *Broaddus v. James*, (Monroe), 13 Cal. App. 464, 110 Pac. 158 (declaring that the mere relation of parent and child is not sufficient to invalidate a deed from the parent to the child. It is merely a circumstance, inviting careful consideration of the transaction). See *PARENT AND CHILD*.

14. *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4. See *infra*, § 44.

15. Civ. Code, § 2235; *Cole v. Wolfskill*, 32 Cal. App. Dec. 1104, 192 Pac. 549. See *TRUSTS*.

16. *Cole v. Wolfskill*, 32 Cal. App. Dec. 1104, 192 Pac. 549.

17. *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306.

18. *Cole v. Wolfskill*, 32 Cal. App. Dec. 1104, 192 Pac. 549. See *TRUSTS*.

contract is made and in agreeing upon its terms the parties deal at arm's-length.¹⁹

§ 44. Husband and Wife.—It is the law of California that, from the mere relation of husband and wife, a business transaction between them will not be tainted with any suspicion of undue influence; that, notwithstanding the influence which may exist by the one over the other, a transaction will not, from this relation alone, be presumed to have been made under undue influence.²⁰ The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity, but is that influence which is superinduced by the relation between them, and generated in the mind of the one spouse by the confiding trust had in the devotion and fidelity of the other. Such influence the law presumes to have been undue, however, whenever this confidence is subsequently violated or abused.¹ But this confidential relation, even when coupled with an entire want of consideration, will not raise an inference of any unfairness in a transaction between them. If a wife has simply shown the marital relation and want of consideration, she falls short of making out a case of undue influence. She cannot there stop and shift the burden to defendants to prove that this confidence has not been abused.² Although a contract entered into between husband and wife is not presumed to have been obtained by undue influence, yet a wife, in seeking specifically to enforce

19. *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981; *Id.*, 168 Cal. 120, 142 Pac. 83.

20. Civ. Code, § 158; *McDougall v. McDougall*, 135 Cal. 316, 67 Pac. 778; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543; *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; *Tillaux v. Tillaux*, 115 Cal.

663, 47 Pac. 691; *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 778 et seq.; HUSBAND AND WIFE.

1. *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186.

2. *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348.

the contract, must allege and prove facts showing its fairness and the adequacy of the consideration.³

§ 45. Remedy in Case of Fraud or Undue Influence.—

A contract is not rendered void by undue influence, but only voidable. The exclusive remedy in such a case is a prompt rescission, or an offer to rescind it so as to put the other party in statu quo.

“A contract which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission.”⁴

By a failure to exercise the option to rescind within a reasonable time the contract is affirmed. On the subject of relief there is this distinction to be noted between contracts induced by fraud and those affected by the exercise of undue influence. In case of the former, the injured party may affirm the contract and recover damages in an action for deceit according to the terms upon which he was led to believe that he was contracting. But where the terms of the contract are perfectly understood, although assented to only because of the exercise of duress, menace, or undue influence, an affirmance being necessarily of the terms of the contract as they were understood when it was made, if those terms are fully complied with, there is nothing due upon the contract, and there can be no cause of action for damages.⁵

3. *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231. See SPECIFIC PERFORMANCE.

4. Civ. Code, § 1566; *Bancroft v. Bancroft*, 110 Cal. 374, 42 Pac. 896; *Id.*, 5 Cal. Unrep. 31, 40 Pac. 488. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 756.

5. *Bancroft v. Bancroft*, 110 Cal. 374, 42 Pac. 896; *Id.*, 5 Cal. Unrep. 31, 40 Pac. 488. In a strong dissenting opinion Garoutte, J., attacks the ruling of the majority. After citing statutory provisions as

authority he says: “By unlawful means defendant induced plaintiff to part with his property for an inadequate consideration. This was a violation of an obligation imposed upon him by law, for it was an infringement upon plaintiff’s rights, and he was entitled to damages in an amount which would compensate him for the detriment directly caused thereby. . . . To support the conclusion I have arrived at in this case, I do not hold that in all cases of contract procured by ‘undue in-

§ 46. Mistake in General.—Section 1567 of the Civil Code declares that consent is not real or free if obtained through “mistake.” Explanatory of this section are section 1576 of the same code, which specifies that “mistake may be either of fact or of law,” and sections 1577 and 1578, defining these two classes of mistake.⁶ Ordinarily, a contract obtained by mistake is not absolutely void, but merely voidable, and may be rescinded,⁷ or its enforcement may be defended at law or enjoined in equity.⁸ “The mistake of which a party to a written contract may be heard to complain in equity can arise in only one of three ways: First, it may be a mistake of law as declared

fluence,’ the remedy of damages is open. Rescission is the only remedy in a case of ‘mistake,’ for no fraud has been practiced; there has been no wrongdoing, the transaction has been innocent, and the parties must be, and should be, satisfied to return to their original position. Such should also be the rule in many cases of undue influence, as where the relations of the contracting parties were such that the law, regardless of any question of bad and wicked intention, would declare the contract void. But the rule here declared is limited to those cases possessing the characteristics of torts, where an act has been done intentionally and knowingly for the very purpose of securing the undue advantage which results. There must be bad faith and a sense of wrongdoing; and such was certainly this case, as shown by the allegations of the complaint.”

Apparently no case has been decided in California, which overturns the majority opinion in *Bancroft v. Bancroft*, *supra*. The dissent by Justice Garoutte has much to recommend it, but the courts have nevertheless followed the majority; and in

view of the holdings in *Bozarth v. Birch*, 34 Cal. App. Dec. 859, 198 Pac. 222, and *McDougall v. Roberts*, 30 Cal. App. Dec. 174, 185 Pac. 483, it must be taken as settled that in all actions for damages from contract induced by menace, undue influence, duress (and even mistake, where there is no deception), there must be a rescission; and the plaintiff has no alternative remedy. In case of deceit—or fraud, as it is called in the decisions, indifferently with the accurate term “deceit”—the plaintiff has an election of two methods of obtaining the remedy; he may either stand on the contract, and sue for what he should have gotten, if the false representations had been true, or he may disaffirm, and sue for the damage he has sustained.

6. *Wingarter v. San Francisco*, 134 Cal. 547, 86 Am. St. Rep. 294, 66 Pac. 730.

7. Civ. Code, §§ 1566, 1689; *Verzan v. McGregor*, 23 Cal. 339. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 783; DEEDS.

8. *Wingarter v. San Francisco*, 134 Cal. 547, 86 Am. St. Rep. 294, 66 Pac. 730.

in section 1578 of the Civil Code. . . . Second, it may be a mistake entertained by the plaintiff with the knowledge of the defendant arising under circumstances which impose the duty upon the defendant to correct the plaintiffs' error. Defendant's failure to do so is itself a species of fraud and is treated as fraud, and under our definitions, therefore, falls in the category of fraud and not of mistake. The third species of mistake is that defined in section 1640 of the Civil Code, which declares that 'when, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.'"⁹ A mistake may arise without blame to either party; or it may result from the misrepresentations of the party gaining thereby, in which case fraud would be involved, but it might be none the less mistake.¹⁰

The rule that mistake must be pleaded¹¹ does not apply unless the cause of action or defense to the cross-complaint rests thereon.¹²

§ 47. Materiality of Mistake.—A mistake is not operative to render a contract voidable if it affects merely some "collateral" though material matter, constituting merely a matter of inducement. To have such effect the mistake must affect the execution and the essential ele-

9. *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808, per Henshaw, J.

10. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. And see *Miller v. Brode*, 62 Cal. Dec. 57, 199 Pac. 531 (holding plaintiff entitled to relief either on the ground of fraud or of mistake).

Where there is a mutual mistake as to an essential matter there is no mutual assent and consequently no contract. See *infra*, §§ 48-55.

11. *Harding v. Robinson*, 175 Cal.

534, 166 Pac. 808; *Bradbury v. Higginson*, 167 Cal. 553, 140 Pac. 254; *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830; *Murray v. Dake*, 46 Cal. 644; *Piereson v. McCahill*, 21 Cal. 122; *Francisco v. Schleischer*, 34 Cal. App. Dec. 158, 195 Pac. 691; *Carr v. King*, 24 Cal. App. 713, 142 Pac. 131; *Mullarky v. Young*, 9 Cal. App. 686, 100 Pac. 709.

12. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. See PLEADING.

ments of the contract,¹³ which elements may be stated to be the parties, the subject matter, the consideration, and the offer and acceptance or consent.¹⁴ The authorities recognize the difficulty of determining whether a mistake applies to an essential feature of the contract or to a purely collateral matter. It is firmly established that if the parties enter into a contract under the belief that the subject matter or consideration is in existence, and in effect condition their contract thereon, and, as a matter of fact, it is not in existence, such mistake will enable a party to avoid the contract. This rule, of course, does not apply to cases where the parties are aware that the existence of the subject matter is doubtful and contract with reference thereto. Thus an ordinary contract of sale of property supposed to be in existence, but which in fact no longer exists, may be avoided.¹⁵ In such a case it is plain that the mistake is material and goes to the very essence of the contract. The assumed fact of existence is the whole basis of the agreement. The same rule must necessarily apply where a material part of the subject matter as to which the parties supposed they were contracting is not in existence at the time the contract is entered into.¹⁶ So, also, a material mistake as to the identity of the subject matter or consideration¹⁷ or as to the amount of the consideration,¹⁸ may go to the very essence of the contract.

The mistake may also be material when it is as to the supposed existence of a right relating to the use of the subject matter of the contract, known by both parties to be the sole basis of the proposed contract. Thus, where

13. *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Schirmer v. Union Brewing etc. Co.*, 26 Cal. App. 169, 146 Pac. 194.

14. Civ. Code, § 1550.

15. Civ. Code, § 1577; *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Flint v. Lyon*, 4 Cal. 17. See SALES.

16. *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094.

17. *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Barfield v. Price*, 40 Cal. 535.

18. *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149 (holding that under facts plaintiff was entitled to relief whether mistake was considered one

the main inducement to enter into a contract of lease is the erroneous belief that a building of a certain kind may lawfully be erected upon the demised premises, whereas a city ordinance prohibits it, the mistake is one, either of law or fact, which entitles the lessee to rescind the lease.¹⁹

§ 48. Mistake of Fact.—The Civil Code provides:

“Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.”²⁰

Where an act is done or a contract is made under an injurious mistake or ignorance of a material fact, it is voidable; and this rule is not limited to cases where there has been a fraudulent concealment, but extends also to cases of innocent misapprehension and mistake.¹ It is not essential, however, in a case of this kind, where the mis-

of law or of fact); *Rovegno v. Def-ferari*, 40 Cal. 459.

19. *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094, the court declaring: “It is proper, however, to note that the quotation from 9 Cyc. 395, to the effect that where one buys land in the expectation of procuring a consent which is required for building on it, and fails to obtain such consent, his mistake will have no effect on the agreement is not opposed to our conclusion. The connection in which this is said shows that the expectation there referred to is one not so regarded by the parties as to constitute an essential feature of the contract of sale, but as a mere expectation of the vendee as to what he may be able to obtain from another party in the future.” See LANDLORD AND TENANT.

20. Civ. Code, § 1577; *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 Pac. 86; *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828 (mortgage given under mistake of fact); *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179.

1. *Verzan v. McGregor*, 23 Cal. 339; *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274; *Belt v. Mehen*, 2 Cal. 159, 56 Am. Dec. 329 (in this case the court further declared that where each party is innocent, and there is no concealment of facts which the other party ought or has a right to know, and no surprise or imposition exists, the mistake, whether mutual or unilateral, is treated as laying no foundation for equitable interference, and is strictly *damnum absque injuria*). See, also, Civ. Code, § 1566.

take or representation affects only one out of many stipulations, to treat the whole agreement as void on disaffirmance, but only that portion to which the mistake or misrepresentation properly applies.²

It is not necessary that a mistake of fact should be mutual. Nor is it true that a contract cannot be set aside for the mistake of one of the parties unless the contract was induced and the mistake arose from the fraud of the other party.³ But, in case of sales, the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality or other collateral attributes is not sufficient if the thing delivered is existent and is the identical thing in kind which was sold.⁴ Although either contracting party has right to rely on a statement made by other of a fact known to such other and unknown to himself,⁵ where the parties treat upon the basis that the fact is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract is valid, notwithstanding any mistake of one of the parties.⁶

Ignorance of legal rights.—Where a person is ignorant or mistaken with respect to his own antecedent and existing legal rights, interests, estates, duties, liabilities or other relation, either of property or contract, or personal status, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests or relations, or of carrying out such as-

2. *Verzan v. McGregor*, 23 Cal. 339. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 783; DEEDS.

3. *Palace Hardware Co. v. Smith*, 134 Cal. 381, 66 Pac. 474; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630.

4. *Taylor v. Ford*, 131 Cal. 140, 63 Pac. 770. See *supra*, § 47. See SALES.

5. *Calmon v. Sarraille*, 142 Cal. 638, 76 Pac. 486; *Bank of Wood-*

land v. Hiatt, 58 Cal. 234; *Willey v. Clements*, 146 Cal. 91, 79 Pac. 850; *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

6. *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 Pac. 86; *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16; *Taber v. Piedmont Heights Bldg. Co.*, 25 Cal. App. 222, 143 Pac. 319.

sumed duties or liabilities, equity will grant relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact.⁷

§ 49. Failure of Contract to Express Agreement.—As has been seen,⁸ mistake may arise after the parties have verbally concluded their agreement and may occur in reducing that agreement to writing, by erroneously adding, omitting or altering some term.⁹ There may be no mistake as to the words used or to be used, and at the same time there may have been a mutual mistake as to some other matter of fact affecting the meaning or application of the words, and by reason thereof the contract may not truly express the real intention of the parties.¹⁰ The aggrieved party is entitled to have the contract revised and reformed and enforced accordingly,¹¹ or, without seeking a reformation, he may set up the matter by way of defense in an action to enforce the contract,¹² parol evidence being admissible to prove the mistake.¹³ It is essential, however, that the oral agreement relied upon was made by the party to the contract or by his agent, acting with authority, actual or ostensible.¹⁴ Furthermore, such a mistake, to justify the modification of a contract, cannot be estab-

7. *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704 (quoting from *Pomeroy's Equity Jurisprudence* and declaring that this rule harmonizes with sections 1577 and 1578 of the Civil Code); *Shaffer v. McCloskey*, 101 Cal. 576, 36 Pac. 196. See *EQUITY*.

8. See *supra*, § 46.

9. *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828; *Schirmer v. Union Brewing etc. Co.*, 26 Cal. App. 169, 146 Pac. 194.

10. *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808; *F. P. Cutting Co. v. Peterson*, 164 Cal. 44, 127 Pac. 163.

11. Civ. Code, §§ 3399, 3401, 3402;

F. P. Cutting Co. v. Peterson, 164 Cal. 44, 127 Pac. 163; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Higgins v. Parsons*, 65 Cal. 280, 3 Pac. 881; *Remington v. Higgins*, 54 Cal. 620; *Pierson v. McCahill*, 23 Cal. 249. See REFORMATION OF INSTRUMENTS.

12. *Fidelity etc. Co. v. Fresno Flume etc. Co.*, 161 Cal. 466, 37 L. R. A. (N. S.) 322, 119 Pac. 646; *Walker v. Brem*, 67 Cal. 600, 8 Pac. 320.

13. *Pierson v. McCahill*, 23 Cal. 249.

14. *Fidelity etc. Co. v. Fresno Flume etc. Co.*, 161 Cal. 466, 37 L. R. A. (N. S.) 322, 119 Pac. 646.

lished by a party who has accepted and acted upon a written agreement by a mere showing that he thought that it expressed something other than that which its plain terms denote. He must show, in addition to the mutuality of the mistake, that the minds of the parties met, that they agreed upon a certain thing which was to have been embodied in their contract, and that, by a mistake, it was either fraudulently or inadvertently omitted or clumsily and ambiguously expressed.¹⁵ The written instrument is not required to be certain and complete in any respect; the only condition is that there shall be an honest effort to reduce the contract to writing, where the statute of frauds requires it, and that the mistake shall be such as is recognized in this branch of equitable jurisdiction.¹⁶ The evidence must be clear and convincing, showing the mistake to the entire satisfaction of the court, and not loose, equivocal or contradictory, leaving the mistake open to doubt.¹⁷ If the evidence is sufficient to satisfy the court that the instrument does not express the intention of the parties, and that the plaintiff had been mistaken in supposing that it did, the fact of his having read the instrument will not prevent the court from finding that it was made under a mistake.¹⁸

§ 50. Acceptance of Instrument in Ignorance of Contents.—If a person enters into a contract with another, between whom and himself no relation of especial trust or confidence exists, and it is reduced to writing by such other person, and the means of a knowledge of the terms of the writing are equally open to both, and he signs it without reading, he cannot avoid a liability created by the writing, even if its terms differ from the contract as

15. *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808, per *Henshaw, J.*

16. *Schirmer v. Union Brewing etc. Co.*, 26 Cal. App. 169, 146 Pac. 194, per *Chipman, P. J.*

17. *Hathaway v. Brady*, 23 Cal. 121; *Lestrade v. Barth*, 19 Cal. 660.

18. *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796; *Higgins v. Parsons*, 65 Cal. 280, 3 Pac. 881.

agreed on verbally.¹⁹ A person accepting a contract is charged with knowledge of all of its provisions, where he had the means of such knowledge and of which he carelessly and negligently deprived himself.²⁰ The fact that he is illiterate does not change the rule. The care of a prudent man in the transaction of his business demands an examination of an instrument before signing, either by himself or by someone for him in whom he had a right to place confidence.¹

While it is quite true, as has been declared, that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation,² this means no more than that when the cause of this failure is satisfactorily explained to a court of equity, the court will hold that the explanation or excuse of the failure relieves from the charge of the neglect of a legal duty within the meaning of section 1577 of the Civil Code.³

Fraud or undue influence.—Clearly, though, the general rule as to the acceptance of an instrument in ignorance of its contents is inapplicable where one party makes false and

19. *Burt v. Los Angeles Olive Growers Assn.*, 175 Cal. 668, 166 Pac. 993; *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Placer County Bank v. Freeman*, 126 Cal. 90, 58 Pac. 388 (holding drawers of draft not exempted from liability thereon, under facts stated); *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222; *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782; *Metropolitan Loan Assn. v. Esche*, 75 Cal. 513, 17 Pac. 675 (refusing reformation of instrument so as to omit a particular clause, on the ground that it was inserted through actual mistake); *Hawkins v. Hawkins*, 50 Cal. 558; *Raymond v. Glover*, 4 Cal. Unrep. 780, 37 Pac. 772, 918.

20. *Gallagher v. Equitable Gas*

Light Co., 141 Cal. 699, 75 Pac. 329; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915; *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51; *Cunningham v. International Committee of Y. M. C. A.*, 34 Cal. App. Dec. 575, 197 Pac. 140.

1. *Hawkins v. Hawkins*, 50 Cal. 558; *Schmidt v. Bekins Van etc. Co.*, 27 Cal. App. 667, 155 Pac. 647; *Muney v. Thompson*, 28 Cal. App. 634, 147 Pac. 1178.

2. *Los Angeles & Redondo R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 21, 87 Pac. 1029. See REFORMATION OF INSTRUMENTS.

3. *Burt v. Los Angeles Olive Growers Assn.*, 175 Cal. 668, 166 Pac. 993.

fraudulent misrepresentations as to material facts, preventing the opposite party from seeking the information which he did not possess, and which, but for such representations, he might have obtained.⁴ Nor does the rule apply where a fiduciary relation exists between the parties,⁵ or when the aggrieved party is in a weak mental condition and unable to comprehend the effect of his act.⁶ In such cases the written instrument is held to be void ab initio, and where the contract is void ab initio, as distinguished from the case where it is merely voidable, rescission and restoration need not be resorted to, and the party may assert his right irrespective of the contract.⁷ But, it has been held, rescission is necessary to avoid the effect of a release where the party releasing thoroughly understood that the release he was executing was what it purported to be, notwithstanding a misconception on his part induced by fraud as to some other statements in the writing.⁸

§ 51. Relief from Mistake of Fact.—In case of a mutual mistake as to the subject matter, the remedy for the aggrieved party is an entire rescission of the contract.⁹ Relief from the consequences of a mutual mistake is not confined to cases where the mistake was with reference to a past event, or to the present existence of some fact or

4. *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042 (setting aside release attained by fraud); *Smith v. Occidental etc. Steamship Co.*, 99 Cal. 462, 34 Pac. 84; *Wilson v. Moriarty*, 77 Cal. 596, 20 Pac. 134; *Id.*, 88 Cal. 207, 26 Pac. 85 (action to rescind contract of lease, the plaintiff being a person of very weak intellect, who could neither read nor write, and the complaint alleging that the defendant acted throughout with a fraudulent intent); *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782.

5. *Calmon v. Sarraille*, 142 Cal.

638, 76 Pac. 486; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630.

6. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630 (incapacity from age); *Edmunds v. Southern Pac. Co.*, 18 Cal. App. 532, 123 Pac. 811 (incapacity from accident).

7. *Garcia v. California Truck Co.*, 183 Cal. 767, 192 Pac. 708; *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042.

8. *Garcia v. California Truck Co.*, 183 Cal. 767, 192 Pac. 708.

9. *Barfield v. Price*, 40 Cal. 535. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 783.

thing. The doctrine is applicable where both parties by mistake expect a future event to occur and describe the subject matter by words which make the intent clear if the event does happen as expected, but which defeat the real intent if the event does not so happen.¹⁰ A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified.¹¹ If the agreement is, however, only executory in its character, so long as it remains such the parties may change its terms or rescind its provisions, or make such disposition of its subject matter as they may choose.¹²

§ 52. Mistake of Law.—Prior to the adoption of the code a court of equity would not relieve a party from a contract entered into by mistake, where the mistake was one purely of law, unattended with misrepresentation, undue influence, misplaced confidence or other special circumstances of similar character.¹³ And courts of law were even less indulgent.¹⁴ By the enactment of section 1576 of the Civil Code, which provides that “mistake may be either of fact or law,” this rule was modified so as to permit relief from mistake of law in certain cases.¹⁵ Of

10. *F. P. Cutting Co. v. Peterson*, 164 Cal. 44, 127 Pac. 163.

11. See REFORMATION OF INSTRUMENTS.

12. Civ. Code, § 1698; *Hochstein v. Berghauser*, 123 Cal. 681, 56 Pac. 547.

13. *Kenyon v. Welty*, 20 Cal. 637, 81 Am. Dec. 137; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.

14. *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Gross v. Parrott*, 16 Cal. 143.

15. *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623; *Carr v. Sacramento Clay Products Co.*, 35 Cal. App. 439, 170 Pac. 446. See

EXECUTIONS, JUDICIAL SALES, as to relief from mistakes made in sales under judicial decrees.

That this was the intention of the code commissioners is plain from their note to section 1576 of the Civil Code. They said: “This chapter undoubtedly modifies the rule heretofore existing in this state as to mistake of law. . . . The rule that no relief should ever be granted on the ground of mistake of law seems too harsh, and in some cases might work great hardship. There is, however, no doubt but that relief upon this ground must be granted with ex-

course, it does not follow that all mistakes of law are to be relieved against. The maxim, "*Ignorantia legis neminem excusat*," generally applies in cases of mistake of law pure and simple.¹⁶ A sound discretion is to be exercised in granting that relief which justice between the parties seems to require.¹⁷

Rescission is the proper remedy when a contract is sought to be avoided on the ground of mistake of law.¹⁸ In the absence of a rescission, the contract must be regarded as still subsisting, and as determining the rights of the parties.¹⁹ Courts of equity will not, save in exceptional cases, in a separate action relieve a party from errors of law, but will grant such relief in the original action upon motion or supplemental bill.²⁰ A mistake of foreign laws is a mistake of fact.¹

§ 53. When Relieved Against.—Section 1578 of the Civil Code defines a mistake of law to be:

"1. A misapprehension of the law by all parties, all supposing they knew and understood it, and all making substantially the same mistake as to the law. . . ."²

Thus a plain and acknowledged mistake of law is not beyond the reach of equity; and where all parties understood the law alike, all making the same mistake, and where the mistake operates to deprive one of them of a

treme caution, and only in a limited class of cases."

16. *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704; *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213; *Christy v. Sullivan*, 50 Cal. 337, 19 Am. Rep. 655.

17. *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623 (declaring that in using the word "mistake" in section 473 of the Code of Civil Procedure, without any qualification, it was intended not to restrict the court in granting relief in furtherance of

justice to that kind of mistake which involves only facts).

18. Civ. Code, § 1566. See *CANCELLATION OF INSTRUMENTS*, vol. 4, p. 484.

19. *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484.

20. *Brackett v. Banegas*, 116 Cal. 278, 58 Am. St. Rep. 164, 48 Pac. 90.

1. Civ. Code, § 1579.

2. *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991.

valuable right, such as that of redemption, and to give to the other a material advantage not contemplated by either, equity will adjust their rights as though the law relating thereto was in fact as the parties supposed it to be, if necessary to do justice.³

Subdivision 2 of section 1578 of the Civil Code further defines a mistake of law as "a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." The scope and limitations of this rule have been summed up in the proposition that a misapprehension of the law by one party of which the others are aware at the time of the entering into the transaction but which they do not rectify, is a sufficient ground for equitable relief. Equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of a law by the other, which he knew of and did not correct. Since equity interposes under such circumstances it follows, a fortiori, that when the mistake of law by one party is induced, aided or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness or surprise, a court of equity will lend its aid and relieve from the consequences of the error.⁴

The section of the code above quoted cannot be invoked to sustain an action for the recovery of taxes or other public debts voluntarily paid under a statute which is afterwards declared to be unconstitutional.⁵ Nor will a contract entered into under a mutual supposition that the law affecting the subject thereof was in accordance with a

3. *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991; *Rosenberg v. Ford*, 85 Cal. 610, 24 Pac. 779.

4. *Carr v. Sacramento Clay Products Co.*, 35 Cal. App. 439, 170 Pac. 446, per *Burnett, J.* (quoting from *Pomeroy's Equity Jurisprudence*).

5. *Wingerter v. San Francisco*, 134 Cal. 547, 86 Am. St. Rep. 294, 66 Pac. 730. See *PAYMENT*, as to recovery of money paid under mistake.

previous decision of the supreme court upon a similar state of facts be set aside because of a subsequent decision by the same court overruling the former one, and declaring a different rule upon the subject.⁶ The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify.⁷ In an early case it was held that a mistake as to the effect of a judicial decree could not be relieved in an action at law.⁸

§ 54. Mistake as to Legal Effect of Instrument.—By a mistake as to the law, contracts often cover more ground and have a different effect than the actual intention of the parties compassed in making them.⁹ A mutual mistake as to the legal effect of an instrument will be relieved against and the instrument enforced as the parties intended.¹⁰ The situation is different, however, as to a unilateral mistake. Prior to the adoption of the code the rule was that in the absence of fraud or mistake of fact a party could not escape the consequences of an arrangement voluntarily made by him, because of a misunderstanding of its legal effect.¹¹ And this rule seems to be unchanged. A mere mistake of law on the part of the grantor of a deed of trust as to the nature and effect of the instrument, supposing it to be a mere testamentary disposition of his property, is not, it has been held, ground for relief in

6. *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213; *Kenyon v. Welty*, 20 Cal. 637, 81 Am. Dec. 137 (decided prior to enactment of code).

7. *Cooley v. County of Calaveras*, 121 Cal. 482, 53 Pac. 1075.

8. *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561.

9. *Friedlander v. Bank of California*, 119 Cal. 93, 51 Pac. 24

(but holding facts did not show such a case).

10. Civ. Code, § 1578, subd. 1; *Remington v. Higgins*, 54 Cal. 620. But see *Silva v. Silva*, 32 Cal. App. 115, 162 Pac. 142, where Shaw, J., held party bound by separation agreement although she claimed she did not intend to sign contract of separation.

11. *Parsons v. Fairbanks*, 22 Cal. 343.

equity, especially where it appears that the grantor intended to put the property beyond the reach of an unfavorable judgment.¹² If the language of a deed is the language intended to be used by the grantor, his mistake as to the legal effect of the language used will not afford him any ground for relief in equity.¹³ The averment of a mistake of law does not bring such a case within that extreme class of mistakes of law from which equity will relieve.¹⁴ It is, of course, true that where an instrument is sought to be avoided for a mistake in law by one party, of which the others are aware at the time of contracting, but which they do not rectify, evidence is admissible as to what the grantor intended to do or convey.¹⁵

§ 55. Misrepresentation of Law as Basis of Mistake.—Misrepresentations of law, at least where there is no relation of trust or confidence between the parties do not amount to fraud, and will not furnish a ground for the rescission of a contract.¹⁶ This rule has frequently been applied to cases involving attempts to escape the effect of releases from liability.¹⁷ In a recent case it was declared: "No case is cited, and we have found none, which decides that where a party in full possession of his faculties signs an instrument which he has read and considered and whose terms and provisions he understands, he may avoid the effect of his act by producing evidence that the adverse party told him that the instrument was not binding." The belief of an employee who claimed damages for personal injuries that a release was not binding,

12. *Kopp v. Gunther*, 95 Cal. 63, 30 Pac. 301.

13. *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142. See *DEEDS*.

14. Civ. Code, § 1578; *Kopp v. Gunther*, 95 Cal. 63, 30 Pac. 301.

15. Civ. Code, § 1578, subd. 2; *Jersey Farm Co. v. Atlanta Realty Co.*, 164 Cal. 412, 129 Pac. 593.

16. *Haviland v. Southern Cali-*

fornia Edison Co., 172 Cal. 601, 158 Pac. 328; *Champion v. Woods*, 79 Cal. 17, 12 Am. St. Rep. 126, 21 Pac. 534. See *CANCELLATION OF INSTRUMENTS*, vol. 4, p. 784. As to relations of trust and confidence, see *supra*, §§ 42-45.

17. *Haviland v. Southern California Edison Co.*, 172 Cal. 601, 158 Pac. 328.

or, in other words, that it did not mean what it said, is not sufficient to establish a mistake of law that would avoid it.¹⁸ But a release of such damages obtained from an employee enfeebled mentally and physically, unable to work, and without financial resources, for an inadequate amount, upon the misrepresentation that the employee was only entitled to a certain amount under the Employers' Liability Act, is properly set aside on the ground of fraud.¹⁹

§ 56. Evidence of Mistake.—A party alleging mistake is bound to sustain his charge by clear and convincing evidence which, standing alone, establishes a *prima facie* case.²⁰ If the evidence does not meet this test, an appellate court may review the judgment on the ground of insufficiency of the evidence.¹ But where the evidence which tends to prove mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, the judgment will not be reversed on the ground that such evidence is contradicted by other evidence.²

A mere conflict of testimony as to the mistake does not necessitate a denial of the relief,³ and the decision of the trial court upon such conflict of evidence is conclusive.⁴

18. *Haviland v. Southern California Edison Co.*, 172 Cal. 601, 158 Pac. 328 (reviewing the cases on the point). See *RELEASE*.

19. *Carr v. Sacramento Clay Products Co.*, 35 Cal. App. 439, 170 Pac. 446.

20. *Home & Farm Co. v. Freitas*, 153 Cal. 680, 96 Pac. 308; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Grant v. McPherson*, 104 Cal. 165, 37 Pac. 864; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85; *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930; *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82; *De Jarnatt v. Cooper*, 59

Cal. 703; *Leonis v. Lazzarovich*, 55 Cal. 52; *Lestrade v. Barth*, 19 Cal. 660; *Roush v. Kirkman*, 42 Cal. App. 115, 183 Pac. 353.

1. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *De Jarnatt v. Cooper*, 59 Cal. 703.

2. *Roush v. Kirkman*, 42 Cal. App. 115, 183 Pac. 353.

3. *Home & Farm Co. v. Freitas*, 153 Cal. 680, 96 Pac. 308; *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796; *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85; *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82.

4. *Home & Farm Co. v. Freitas*, 153 Cal. 680, 96 Pac. 308; *Sullivan*

The only question which the appellate court has to decide in respect to the sufficiency of the evidence is whether that which tends to prove the alleged fraud or mistake, if standing alone without contradiction, would make out a *prima facie* case.⁵ Where the very issue in the action is the mutuality of the mistake, the trial court is compelled to decide upon conflicting evidence; and if a mere denial of the defendant that he was mistaken is to suffice, it would, it has been pointed out, result in every case that where such denial is made the plaintiff must fail of relief. Such, however, is not the law.⁶

In the absence of evidence that the defendant's mistake was caused by the neglect of a legal duty on his part, the presumption is against such neglect and the defendant is not required to make a negative showing on that subject. It is sufficient that the mistake arose from the "unconscious ignorance" of a present fact to sustain it under section 1577 of the Civil Code.⁷ In a case where the writing itself, through mistake, does not express the intention of the parties, or of one of them, and does not therefore contain the real contract, an objection as to parol proof is without merit.⁸

§ 57. Ratification or Confirmation of Contract.—The terms "adopt" and "ratify" are properly applicable to contracts only by a party acting or assuming to act for another.⁹ However, these terms are frequently used to designate the act by which a contract which is voidable, due to consent not being free or real, is validated.^{9a} The

v. Moorhead, 99 Cal. 157, 33 Pac. 796.
See *APPEAL AND ERROR*, vol. 2, p. 921
et seq.

5. Roush v. Kirkman, 42 Cal. App. 115, 183 Pac. 353.

6. Home & Farm Co. v. Freitas, 153 Cal. 680, 96 Pac. 308; Roush v. Kirkman, 42 Cal. App. 115, 183 Pac. 353, per Waste, P. J.

7. Hardison v. Davis, 131 Cal. 635, 63 Pac. 1005.

8. McCombs v. Church, 180 Cal. 233, 180 Pac. 535.

9. Ellison v. Jackson Water Co., 12 Cal. 542; Snook v. Page, 29 Cal. App. 246, 155 Pac. 107. See *AGENCY*, vol. I, p. 766 et seq., where the doctrine of ratification is fully discussed.

9a. California Nat. Supply Co. v. O'Brien, 34 Cal. App. Dec. 688, 197 Pac. 414, holding that in order to

code provides that "A contract which is voidable solely for want of due consent may be ratified by a subsequent consent."¹⁰ Such a contract, more properly speaking, is "confirmed." A confirmation is a contract by which an act that was voidable is made firm and unavoidable.¹¹

The effect of a ratification or confirmation is to prevent the party from afterward disaffirming. This, of course, necessarily implies that but for the disaffirmance the contract would be binding. Where the contract is not binding in any event, but is utterly void from the beginning, no ratification can make it valid. There must be some act which is the equivalent of the execution of a new contract, or something which operates as an estoppel.¹² There is a well-defined distinction between ratification of an agreement and facts constituting an estoppel to deny its validity.¹³

The acceptance and retention of the consideration, after learning all the facts, is a ratification of the agreement under which it was paid.¹⁴ And any material act done by a party with knowledge of the facts constituting fraud, or under such circumstances that knowledge must be imputed, which assumes that the transaction is valid, constitutes a ratification.¹⁵ If a party has knowledge that he has been defrauded, and yet subsequently confirms the original contract by making a new agreement and engagement respecting it, he thereby waives the fraud, and

contend successfully that one to whom corporate stock has been issued without authority subsequently became a stockholder by ratifying the unauthorized issue, it must appear that there was a conscious and intended approval thereof.

10. Civ. Code, § 1588.

11. Barr v. Schroeder, 32 Cal. 609.

12. Hakes Investment Co. v. Lyons, 166 Cal. 557, 137 Pac. 911; Barr v. Schroeder, 32 Cal. 609. See supra, § 12; and see CANCELLATION OF INSTRUMENTS, vol. 4, p. 802.

13. Blair v. Brownstone Oil, etc. Co., 168 Cal. 632, 143 Pac. 1022. See ESTOPPEL.

14. Simons v. Bedell, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3.

15. Sausalito Bay Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 Pac. 57; Fulmele v. Los Angeles Investment Co., 34 Cal. App. Dec. 533, 196 Pac. 923; Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 167, 133 Pac. 978.

abandons his claim to relief.¹⁶ But the rule that fraud is condoned by dealing with the defrauded party after full discovery of the fraud, and that such condonation precludes both rescission and an action for deceit for the fraud, has no application where the only acts of such dealing were prior to the actual discovery of the fraud.¹⁷ Waiver of fraud is usually a question of fact.¹⁸

IV. LEGALITY OF OBJECT.

In General.

§ 58. **Legality as Element of Contract.**—At no time in the history of the common law were contracts in violation of law regarded as valid. Individuals were never allowed to stipulate for iniquity. A contract, though based on consent, derives its obligatory force from the sanction of the law.^{19a} The law, which prohibits the end, will not lend its aid in promoting the means designed to carry it into effect. It will not promote in one form that which it declares wrong in another. The whole doctrine relating to illegal contracts is founded on a regard for the public welfare. It may therefore be said to be a fundamental principle that a contract must have a lawful purpose and that transactions in violation of law cannot be made the foundation of a valid contract.¹⁹ No ratification or attempted ratification can validate a contract denounced by both the civil and the criminal law, nor silence an objector to its enforcement, even though he may originally have assented thereto.²⁰

16. *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Schmidt v. Mesmer*, 116 Cal. 267, 48 Pac. 54; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, 6 L. R. A. 219, 22 Pac. 515.

17. *Montgomery v. McLaury*, 143 Cal. 83, 76 Pac. 964.

18. *Wilder v. Beede*, 119 Cal. 646,

51 Pac. 1083. See **FRAUD AND DECEIT**.

18a. See *supra*, § 5.

19. *Scheeline v. Pezzola*, 29 Cal. App. 266, 155 Pac. 127, per Burnett, J. (quoting 6 *Ruling Case Law*, p. 692). And see *infra*, § 107.

20. *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884; *Colby v. Title Ins. &*

§ 59. Sources of Illegality.—Illegality in a contract is frequently found in the consideration. An illegal consideration not only will not support a contract, but a contract founded on such a consideration is itself illegal.¹ Usually the element that destroys the validity of a contract is the purpose of the parties to accomplish or to aid an unlawful object. The third element designated by section 1550 of the Civil Code as essential to the existence of a contract is a lawful object.² The object of a contract as defined by section 1595 of the Civil Code, is "the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do." "The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed."³ "Everything is deemed possible except that which is impossible in the nature of things."⁴ If the object of a contract is unlawful, the contract is void, irrespective of the consideration upon which it is made.⁵

Contracts may be either *malum prohibitum* or *malum in se*.⁶ That is not lawful which is "(1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or, (3) otherwise contrary to good morals."⁷ It is not always

Trust Co., 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. B. A. (N. S.) 813, 117 Pac. 913; Visalia Gas etc. Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

1. See *infra*, §§ 129, 130, as to illegality of consideration.

2. Union Const. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 Pac. 242 (provisions of Civil Code relating to legality of object construed with reference to contracts limiting liability of telegraph company); Scheeline v. Pezzola, 29 Cal. App. 266, 155 Pac. 127 (illegal sales of intoxicating liquors).

3. Civ. Code, § 1596.

4. Civ. Code, § 1597. See *infra*,

§§ 262, 267, as to impossibility as excusing performance.

5. Firebaugh v. Burbank, 121 Cal. 186, 53 Pac. 560 (holding that a contract between the heir and the attorney for the executor, agreeing to pay unallowed claims in favor of the attorney for extra services rendered by him to the executor, and in favor of the executor for commissions and extraordinary services, is illegal and void, and cannot be enforced against the heir).

6. See *infra*, § 61, as to distinction between contracts *malum prohibitum* and *malum in se*.

7. Civ. Code, § 1667; Union Const. Co. v. Western Union Tel. Co., 163

a statutory provision which renders a certain class of contracts *malum prohibitum*. As in the case of margin contracts, a self-executing provision of the constitution, needing no act of the legislature to support it, may have that effect.⁸ However, the law generally presumes in favor of the validity of contracts.⁹ And a contract valid by the law of the place where it is made is, as a general rule, valid everywhere.¹⁰ But it has been held that, under the general provisions of section 1670 of the Civil Code making all contracts for liquidated damages void, except as expressly provided in section 1671, it must be presumed, in the absence of a showing that the case is within the exception, that the contract for liquidated damages is invalid; and the exception must be both pleaded and proved to overcome that presumption.¹¹

§ 60. Illegal Contracts Distinguished from Contracts Merely Unenforceable.—In considering the question of illegality, a distinction has been made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses

Cal. 298, 125 Pac. 242; *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006 (private contract for work on street); *Jones v. Hanna*, 81 Cal. 507, 22 Pac. 883 (illegal contract by executrix); *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121 (contract for experting county books); *Shain v. Goodwin*, 46 Fed. 564 (gambling contract).

8. *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393. See as to margin contracts, *BROKERS*, vol. 4, p. 637.

9. *Shaver v. Bear River & Auburn Water & Mining Co.*, 10 Cal. 396 (purchase of realty for corporation by officer thereof); *George J. Birkel Co. v. Howze*, 12 Cal. App. 645, 103 Pac. 145 (transfer of shares of stock for an agreed price, accom-

panied by agreement by vendor to repurchase the stock). And see *City Street Imp. Co. v. Kroh*, 158 Cal. 308, wherein it was declared that it would be presumed that the parties all disregarded an unconstitutional specification in the contract. See *infra*, § 168, as to construing contract in favor of validity.

10. *Fenton v. Edwards*, 126 Cal. 43, 77 Am. St. Rep. 141, 46 L. R. A. 852, 58 Pac. 320 (assignment for the benefit of creditors). See *CONFLICT OF LAWS*, vol. 5, p. 416.

11. *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499. As to contracts for liquidated damages, see *DAMAGES*.

an express statutory prohibition, and one wherein the act to be performed is lawful, but the agreement is invalid because of the manner it was entered into, or because of incapacity to contract in either of the parties.¹² The first receives no aid or encouragement whatever from the courts on the principle "*Ex turpi causa non oritur actio.*"¹³ When a contract looks to the doing of a lawful act, but may be avoided by one of the parties to it because of the existence of a fiduciary relation between him and the other party at the time of the execution of the contract, the above rule is applied in order to avoid the possibility of the latter reaping any undue advantage. If, however, such a contract has been executed, without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement wherein advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it; nor is it allowed out of consideration for the defendant. When the thing accomplished by a contract is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good.¹⁴

§ 61. Contracts Malum in Se and Malum Prohibitum Distinguished.—There is a marked distinction between

12. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777 (quoting *City of Concordia v. Hagaman*, 1 Kan. App. 35, 41 Pac. 133; *Porter v. Fisher*, 4 Cal. Unrep. 324, 34 Pac. 700 (construing section 1624 of the Civil Code)).

13. See *infra*, § 105 et seq. See *ACTIONS*, vol. 1, p. 333.

14. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777, per Henshaw, J. (quoting *City of Concordia v. Hagaman*, 1 Kan. App. 35, 41 Pac. 133). See *infra*, §§ 70-82, as to contracts against public policy.

contracts which are *malum in se* and those which are merely *malum prohibitum*, and this distinction is recognized in all the cases involving questions growing out of illegal contracts. Remedies are, in certain classes of cases, afforded to one of the parties to contracts of the latter character.¹⁵ All the consequences which attend a contract contrary to public morals do not attend one which is purely *malum prohibitum*, and, in the latter case, it has been said that courts will take notice of the circumstances, and will give relief, if justice requires a restoration of money received by either party thereunder.¹⁶ But the principle that parties to a contract *malum in se*, whether it be executory or executed, and whether the action be brought on the contract or to recover the consideration, are denied all remedy, is firmly established by a series of decisions almost unbroken. Indeed, it has been declared that there is no rule of law placed more completely beyond controversy than this. It is to such contracts especially that the maxim, "*Ex turpi causa non oritur actio*" has application, and also the kindred maxim, "*In pari delicto potior est conditio defendentis*." In contracts which contemplate the performance of some act which involves moral turpitude or violates the general principles of public policy—or, generally stated, which are *malum in se*—both parties are in *pari delicto*.¹⁷

§ 62. Mode of Performance.—If an agreement does not provide for a method whereby its purpose is to be accomplished, it must be assumed, if it can be accomplished by any legal method, that such method was contemplated when the contract was made, and will be pursued.¹⁸ It is the universal rule that where a contract can be performed legally, it will not be presumed that the parties

15. *Martin v. Wade*, 37 Cal. 168. And see *infra*, § 105 et seq. See

16. *Smith v. Bach*, 183 Cal. 259, ACTIONS, vol. 1, p. 333.
191 Pac. 14; *Id.*, 35 Cal. App. Dec. 18. *Burne v. Lee*, 156 Cal. 221,
331, 199 Pac. 1108. 104 Pac. 438; *Aston v. Nolan*, 63

17. *Martin v. Wade*, 37 Cal. 168. Cal. 269.

intended to perform it in an illegal manner.¹⁹ Moreover, where a contract can be performed in a legal manner as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner.²⁰ The principle last stated is applied where the contract manifests no intent or purpose that it is to be performed in an illegal manner and where also the party complaining does not participate in, or co-operate with, the illegal performance.¹

If the method provided for carrying into effect the principal purposes of an agreement has been executed and accepted by both parties, and the whole contract in itself is valid, it will not be permitted to fall because of any supposed invalidity attaching to the means adopted.² And although a certain form of contract might be used to effect a prohibited transaction not appearing upon its face, yet, if its true character is different from that which on its face it purports to be, the burden is upon the party seeking to be relieved therefrom to show such variance. If such burden is not sustained, and there is nothing in the record indicating that the transaction is other than that which it purports to be, its legality must be presumed.³

§ 63. Unlawful Intent.—An act which is authorized by law is neither *malum in se* nor *malum prohibitum*.⁴ But an act may be lawful in itself, or rather lawful when done for a legitimate purpose, and be wholly illegal when done as ancillary, or to give effect to an unlawful purpose. Generally speaking, it has been said, a man may agree to borrow money for another, and the agreement may be en-

19. *Fites v. Marsh*, 171 Cal. 487, 153 Pac. 926; *Schweppe v. Sandberg*, 34 Cal. App. Dec. 56, 195 Pac. 454; *Fitzhugh v. Mason*, 2 Cal. App. 220, 83 Pac. 282.

20. *Teachout v. Bogy*, 175 Cal. 481, 166 Pac. 319.

1. *Teachout v. Bogy*, 175 Cal. 481, 166 Pac. 319.

2. *Estate of Yoell*, 164 Cal. 540, 129 Pac. 999.

3. *George J. Birkel Co. v. Howze*, 12 Cal. App. 645, 108 Pac. 145, per *Allen, P. J.*

4. *Lucas v. Pico*, 55 Cal. 126.

forced; but if the agreement to borrow were connected with the intended use of the money in a business interdicted by the laws, the whole agreement would be void.⁵ Admitting that a contract legal in its terms and in its consideration may be rendered illegal, as against public policy, by reason of the intention of the parties thereto at the time of entering into it to so use it as thereby to commit civil injury to third persons, it has, nevertheless, been doubted whether the mere existence in the minds of some of the parties of such a purpose—a purpose different from the main purpose, and never in fact carried into execution—is, after the contract has been acted upon and acquiesced in for a number of months, ground sufficient to justify the denial of any remedy thereon.⁶ And even though the original intent of a party was unlawful, if the intention was abandoned and never consummated, the asserted illegality was in the contract and not in the right growing out of its premature termination by a judgment for cancellation and restitution, and the doctrine that one cannot recover upon a contract against public policy does not apply. Where an illegal purpose has never been accomplished but has been abandoned, the contract has never been executed, and there may be a recovery, provided such recovery does not of itself accomplish the illegal purpose, or require a resort to the illegal part of the contract for its support.⁷

§ 64. Mode of Contracting Prescribed by Statute.—A contract is of course illegal when made in direct disregard of the provisions of a statute which provides for, and regulates the making of, such contracts.⁸ Where the stat-

5. *Valentine v. Stewart*, 15 Cal. 387.

6. *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364, 61 C. C. A. 334 (construing section 1673 of the Civil Code relative to contracts in restraint of trade).

7. *Green v. Frahm*, 176 Cal. 259, 168 Pac. 114, action for recovery of deposit made as security for performance of lease.

8. *Jacks v. Taylor*, 34 Cal. App. 95, 166 Pac. 858; *Id.*, 24 Cal. App. 667, 142 Pac. 121. And see *infra*, §§ 65-69.

ute prescribes the only mode by which the power to contract shall be exercised, as is frequently done with municipalities and other state agencies, the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding as a contract and the doctrine of implied liability has no application in such cases.⁹ Under such circumstances the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all which can be exercised in no other manner.¹⁰ If the statute forbids the contract which has been made, the contractor knows it, or ought to know it, before he places his money or services at hazard.¹¹ But in the absence of such a restriction on the mode of contracting the same general rule applies to inferior political bodies as to individuals, and the former are held responsible on an implied contract for the payment of benefits received under an illegal express contract not prohibited by law.¹²

Contracts in Violation of Statute.

§ 65. **In General.**—By subdivision 1 of section 1667 of the Civil Code reference is made to contracts expressly prohibited.¹³ The courts do not recognize as valid a contract founded upon an act which is absolutely forbidden by law. Broadly speaking, there can be no doubt that a

9. *Reams v. Cooley*, 171 Cal. 150, Ann. Cas. 1917A, 1260, 152 Pac. 293; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; *Murphy v. Napa County*, 20 Cal. 497; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Fountain v. City of Sacramento*, 1 Cal. App. 461, 82 Pac. 637. See MUNICIPAL CORPORATIONS.

10. *Reams v. Cooley*, 171 Cal. 150, Ann. Cas. 1917A, 1260, 152 Pac. 293.

11. *Reams v. Cooley*, 171 Cal. 150, Ann. Cas. 1917A, 1260, 152 Pac. 293; *Shaw v. San Francisco*, 13 Cal. App. 547, 110 Pac. 149; *Fountain v. City*

of Sacramento, 1 Cal. App. 461, 82 Pac. 637.

12. *Reams v. Cooley*, 171 Cal. 150, Ann. Cas. 1917A, 1260, 152 Pac. 293; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189; *Sacramento County v. Southern Pac. Co.*, 137 Cal. 217, 59 Pac. 568, 825; *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670. See *supra*, §§ 7-9; and see MUNICIPAL CORPORATIONS.

13. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777.

contract is illegal if it violates a constitutional statute or if it cannot be performed without the violation of such a statute.¹⁴ In this respect there is no distinction between statutes and ordinances. It is as much a breach of duty to evade or violate the one as it is to evade or violate the other.¹⁵ A prohibitory ordinance cannot of course have a retrospective effect.¹⁶ Where noncompliance with a statute would constitute a criminal offense, the court will, unless the contrary be shown, indulge in the presumption that plaintiff has complied therewith.¹⁷ The law will not presume a contract to pay interest where, to have agreed directly to do so, would be a felony, rendering the contract void.¹⁸ And the law will not imply a promise to pay for services illegally rendered under a contract expressly prohibited by law.¹⁹

§ 66. Express or Implied Prohibition.—A statute may either expressly command, prohibit or enjoin an act, or it may impliedly command, prohibit or enjoin it by fixing a penalty for the nonperformance or commission thereof.²⁰ A court will not lend its aid to give effect to a contract which is illegal, either expressly or by implication, be-

14. *Eymann v. Wright*, 177 Cal. 144, 169 Pac. 1037 (contract void under Desert Land Act, March 3, 1877); *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825 (contract in violation of penal laws regulating pawnbrokers); *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *McCullough v. Board of Education*, 51 Cal. 418; *Luchini v. Roux*, 29 Cal. App. 755, 157 Pac. 554. And see *infra*, § 67.

15. *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25.

16. *Gray v. Long*, 4 Cal. Unrep. 724, 37 Pac. 380 (ordinance prohib-

iting sale of diseased trees). See MUNICIPAL CORPORATIONS.

17. *Harris v. Bucher*, 25 Cal. App. 380, 143 Pac. 796.

18. *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510. See INTEREST.

19. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880. See *supra*, §§ 7-10, as to implied contracts generally.

20. *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825.

cause in violation of the common or statute law.¹ The Civil Code makes that unlawful which is either contrary to the express provision of law or "contrary to the policy of express law, though not expressly prohibited."² It is not necessary that any statute should expressly declare the contract void; but if, upon review of all the legislation upon the subject, the contract appears to contravene the design and policy of the law, a court of equity will not enforce it.³ So, too, if, upon a comprehensive view of the several provisions of the constitution relating to a subject, there is disclosed a well-defined policy and intention on the part of the framers of the constitution which is capable of enforcement, the courts should give to a particular clause a construction in harmony with such policy, and an effect which will not only prevent any direct infringement of its terms, but every indirect attempt to evade them.⁴ An agreement the purpose of which is to secure from the state large tracts of land through the applications in a manner unauthorized by law, and which contravenes the spirit and policy of the land laws, is illegal and void.⁵

§ 67. Implication from Imposition of Penalty.—It is of course undisputed that a contract in violation of a statute is void, and no difficulty can arise in such a case.⁶ As has been remarked, more trouble has been experienced by the courts where the case was one in which there was no express prohibition of the act in question, but where a penalty for the performance or nonperformance has been

1. *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *McGregor v. Donelly*, 67 Cal. 149, 7 Pac. 422.

2. Civ. Code, § 1667; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880.

3. *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735. See SPECIFIC PERFORMANCE.

4. *Daw v. Niles*, 104 Cal. 106, 37 Pac. 876 (construing section 5 of article XIII of the constitution, prohibiting contracts by which debtors are

obligated to pay mortgage taxes). See CONSTITUTIONAL LAW, vol. 5, p. 591 et seq.

5. *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735.

6. *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825; *Napa Valley Electric Co. v. Calistoga Electric Co.*, 38 Cal. App. 477, 176 Pac. 699.

imposed.⁷ The general rule controlling in cases of this character is that, where a statute is passed for the protection of the public and not as a revenue measure, and it prohibits or attaches a penalty to the doing of an act, the act is illegal, and this, notwithstanding that the statute does not expressly pronounce it so.⁸ And a contract founded upon such an act is void.⁹ The statute is a prohibition of the law from entering into such a contract at all, and the illegality affects the whole transaction from its inception.¹⁰ And it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*.¹¹ Cases may be found holding a contrary doctrine; but an examination of those cases will, it has been said, show that the statutes upon which they are based generally do not prohibit, but merely impose a fine as an exclusive punishment.¹² A statute of this character, prohibiting the

7. *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575.

8. *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14; *Id.*, 35 Cal. App. Dec. 331, 199 Pac. 1108; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Napa Valley Electric Co. v. Calistoga Electric Co.*, 38 Cal. App. 477, 176 Pac. 699 (construing section 76 of the Public Utilities Act, Stats. Ex. Sess. 1911, p. 44, regulating transactions concerning property of electrical corporations).

9. Civ. Code, § 1667; *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14; *Id.*, 35 Cal. App. Dec. 331, 199 Pac. 1108 (contract for the sale of land by reference to an unrecorded map in violation of the provisions of the act of March 15, 1907, Stats. 1907, p. 290), followed by *Young v. Laguna Land & Water Co.*, 35 Cal. App. Dec. 388, 199 Pac. 810 (decided under the act of 1907, as amended in 1913, Stats. 1913, pp.

570, 571); *Bentley v. Hurlburt*, 153 Cal. 796, 96 Pac. 890 (construing act of March 9, 1893, requiring recording of maps of subdivisions of lands into small lots for purposes of sale); *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777.

10. *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825.

11. *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14; *Id.*, 35 Cal. App. Dec. 331, 199 Pac. 1108.

12. *Smith v. Bach*, 183 Cal. 259, 191 Pac. 44; *Id.*, 35 Cal. App. Dec. 331, 199 Pac. 1108; *Marconi Wireless Telegraph Co. v. North Pacific S. S. Co.*, 36 Cal. App. 653, 173 Pac. 103 (construing section 18 of the Public Utilities Act, Stats. 1911, p. 18, which required filing of rate schedule by telegraph companies); *Luchini v. Roux*, 29 Cal. App. 755,

making of contracts except in a certain manner, ipso facto makes them void if made in any other way.¹³ The rule is, however, not without exceptions, and the statute must be examined as a whole to ascertain whether it intended that a contract in contravention of it should be void or not.¹⁴ A statute which imposes a penalty should be strictly construed against the liability.¹⁵ A distinction has been drawn between provisions and penalties which aim to prohibit the making of contracts, and the imposition of duties which are entirely collateral to an individual contract. The supreme court has refused to go so far as to say that a contract is void simply because there has been a noncompliance with such duties.¹⁶

§ 68. Licenses and Permits.—It is generally held that when the object of the statute or ordinance in requiring a license or certificate for the privilege of practicing a particular profession or of carrying on a certain business is to prevent improper persons from engaging in that business, or is for the purpose of regulating it for the protection of the public or in the interest of public morals, health or police, the imposition of the penalty amounts to a prohibition, and a contract made by an unlicensed person in violation of the statute or ordinance is void.¹⁷

157 Pac. 554 (construing sections 6 and 16 of Dairy Act, Stats. 1911, p. 959, requiring dairy owners to register with state bureau).

13. *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14; *Id.*, 35 Cal. App. Dec. 331, 199 Pac. 1108; *King v. Johnson*, 30 Cal. App. 63, 157 Pac. 531; *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113 (decided under section 1183 of the Code of Civil Procedure, which, prior to its amendment in 1911, provided that if the provisions of such section as to the filing of a building contract involving more than a certain amount

were not complied with, the contract would be wholly void).

14. *Bentley v. Hurlburt*, 153 Cal. 796, 96 Pac. 890.

15. *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150. See PENALTIES; STATUTES.

16. *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825.

17. *Wood v. Krepps*, 168 Cal. 382, L. R. A. 1915B, 851, 143 Pac. 691; *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880 (physician);

And when, acting within the scope of its constitutional powers, the legislature has sought by statute to provide that certain contracts may be made only after obtaining special permits so to do, such permits become conditions precedent to the making of enforceable contracts.¹⁸ It has been declared, however, that a contract for the employment of an architect is not rendered illegal or void because made in advance of the issuance of the certificate to the architect under the act of 1901, to regulate the practice of architecture, though in order to carry out the contract it would be necessary for the architect to take out his certificate.¹⁹ In any event, it would seem that there may be a recovery on an implied contract for services rendered after such certificate is procured.²⁰

When the object of a statute or ordinance in imposing a license to conduct a legitimate business is solely for the purpose of yielding a revenue and not for the purpose of protection, contracts made in the course of such business

Johnson v. Davidson, 36 Cal. App. Dec. 166 (in this case the supreme court in bank, in its opinion denying a hearing, reported 62 Cal. Dec. 568, 202 Pac. 159, declared that the record failed to show an illegal agreement to engage in the practice of law); Scheeline v. Pezzola, 29 Cal. App. 266, 155 Pac. 127. See Houston v. Williams, 35 Cal. App. Dec. 470, 200 Pac. 55, wherein the court declares that it is a reasonable construction of the act of May 27, 1919 (Stats. 1919, p. 1252), regulating the business of acting as a real estate broker or salesman to hold that it is unlawful for anyone to engage in the business of a real estate broker without having secured a license, but that he is not precluded from recovering compensation for his services if he had such license at the time his cause of action arose, although his

contract may have been executed prior to that time when he had no license. See BROKERS, vol. 4, p. 551.

See ATTORNEYS AT LAW, vol. 3, p. 576; see, also, note, 4 A. L. R. 1087. See, also, LICENSES.

18. Napa Valley Electric Co. v. Calistoga Electric Co., 38 Cal. App. 477, 176 Pac. 699; Jacks v. Taylor, 24 Cal. App. 667, 142 Pac. 121 (contract for experting county books).

19. Fitzhugh v. Mason, 2 Cal. App. 220, 83 Pac. 282. See ARCHITECTS, vol. 3, p. 95. See, also, Houston v. Williams, 35 Cal. App. Dec. 470, 200 Pac. 55, holding to similar effect, under the act of May 27, 1919 (Stats. 1919, p. 1252). As to regulation of brokers, see BROKERS, vol. 4, p. 551.

20. Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880.

are valid, notwithstanding a penalty is imposed for a failure to obtain a license to conduct it. The question of such licenses to carry on business is essentially one between the municipality and the person engaging in business within the territorial limits thereof; it is not a matter in which third parties are interested.¹

§ 69. Repeal of Prohibitory Law.—If a contract is void by the law in force at the time it is made, the subsequent repeal of the law will not validate such contract.² Thus, although contracts for the purchase and sale of stocks on margin are not necessarily void under the constitution as amended in 1908, yet the amendment did not have the effect of validating margin contracts entered into while the old section was in force, all such contracts being forbidden thereby.³ Statutes changing the law relating to usury seem to constitute an exception to the general rule.⁴ The decisions recognizing the exception are based on the ground that the right to set up usury as a defense and avoid a contract to pay principal or interest is in the nature of a statutory penalty upon the lender and comes within the rule that the repeal of a penal law instantly releases the penalty imposed, and that it is not a property right, but a mere privilege pertaining only to the remedy, which the legislature may take away.⁵

1. *Wood v. Krepps*, 168 Cal. 382, L. R. A. 1915B, 851, 143 Pac. 691, per Lorigan, J.

2. *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913C, 1392, 123 Pac. 276. As to effect of repeals generally, see *STATUTES*.

3. See *BROKERS*, vol. 4, p. 639.

4. *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913C, 1392, 123 Pac. 276. See *USURY*.

5-6. *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913C, 1392, 123 Pac. 276.

Contracts Contravening Public Policy.

§ 70. **What is Public Policy.**—A contract which essentially violates morality or public policy is illegal and void.⁷ Whether a contract against public policy be executory or executed, no action may be brought, either on the contract or to recover back the consideration.⁸ “Public policy” is a term of vague and uncertain meaning, and it has been said that few cases can arise in which its application may not be disputed.⁹ The term has not been precisely defined by the courts, but has been left loose and free of definition in the same manner as fraud. The authorities all agree, however, that a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society.¹⁰ Fundamentally, it pertains to the law-making power to declare what contracts are against public policy.¹¹ The policy of the state can be ascertained only by

7. Civ. Code, §§ 1667, 1668; *McCowen v. Pew*, 153 Cal. 735, 15 Ann. Cas. 630, 21 L. R. A. (N. S.) 800, 96 Pac. 893 (applying rule in action on contract giving an option to purchase certain lands as an inducement to building of a line of railroad between certain points); *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015; *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 Pac. 42; *Murray Showcase etc. Co. v. Sullivan*, 15 Cal. App. 475, 115 Pac. 259 (where president of corporation told manager unless certain shortage was paid he would rely on his bond to collect amount due, this was not a threat of arrest invalidating notes given in settlement of shortage); *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69; *Pike's*

Peak Paint Co. v. John W. Masury & Son, 19 Colo. App. 286, 74 Pac. 796 (upholding contract as not being against public policy when performance would in no way have tendency to injure public).

8. *Martin v. Wade*, 37 Cal. 168.

9. *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69.

10. *Northwestern Mutual Fire Assn. v. Pacific Wharf & Storage Co.*, 62 Cal. Dec. 331, 200 Pac. 934; *Id.*, 33 Cal. App. Dec. 104; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69.

11. *Dibble v. Reliance Life Ins. Co.*, 170 Cal. 199, Ann. Cas. 1917E, 34, 149 Pac. 171; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582; *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015 (declaring that public policy is not

reference to the constitution and laws passed under it, or, which is the same thing, to the principles underlying and recognized by the constitution and laws.¹² Courts are apt to encroach upon the domain of the law-making branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law.¹³ Furthermore, it has been said that what is the public policy of a state, and what is contrary to it if inquired into beyond what its constitution, laws and judicial decisions make known, will be found to be matter of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will differ.¹⁴ But, it has been declared, courts are justified in declaring a contract void as against public policy, when it is expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute.¹⁵ It is certain that if a contract conforms to the public policy when made, a change in that policy will not avoid it.¹⁶

§ 71. Attitude of Judiciary.—While contracts opposed to morality or law should not be upheld, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations. The courts, so recognizing, have allowed parties the widest latitude in this regard, and, unless it is entirely plain that a contract is violative of sound public policy, they will not

made or unmade by the acts or omissions of a police department).

12. *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

13. *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 532.

14. *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439, per Chipman, C.

15. *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

16. *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 29 L. R. A. 751, 41 Pac. 783.

so declare.¹⁷ "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."¹⁸ Before relief may be denied because of the unlawful nature of a contract, whereby some rule of public policy is claimed to have been violated, it should appear clearly that the case comes within that class, and that the agreement in its essential obligations is tainted with improper motives.¹⁹ But where a contract belongs to a class which is reprobated by public policy, it will be declared illegal though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract and not its actual result.²⁰ Whether or not a contract in any given case is contrary to public policy is a question of law to be determined from the circumstances of each particular case.¹

§ 72. What Contracts are Against Public Policy.— Within subdivisions 2 and 3 of section 1667 of the Civil Code are embraced the multitude of contracts which,

17. *Northwestern Mutual Fire Assn. v. Pacific Wharf & Storage Co.*, 33 Cal. App. Dec. 104; 62 Cal. Dec. 331, 200 Pac. 934; *Id.*, 35 Cal. App. 104; *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582; *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 29 L. R. A. 751, 41 Pac. 783; *In re Garcelon's Estate*, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414; *Thompson v. Thomas*, 30 Cal. App. Dec. 200, 185 Pac. 427 (mortgage providing that mortgagee might release part of mortgaged property without af-

fecting the personal liability of those liable for the indebtedness, or the lien upon the remainder of the mortgaged premises, held not against public policy); *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379.

18. *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 29 L. R. A. 751, 41 Pac. 783 (quoting from *Richmond v. Dubuque etc. R. Co.*, 26 Iowa, 191).

19. *Goodhart v. Mission Pub. Co.*, 18 Cal. App. 394, 123 Pac. 210.

20. *Stephens v. Lemoore Canal & Irr. Co.*, 22 Cal. App. 579, 135 Pac. 707.

1. *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379.

though not expressly prohibited, are refused recognition upon grounds of public policy. These contracts, in contemplation of their subject matter, have been divided into two distinct classes; the first where the consideration is base and against good morals, *malum in se*; the second, where the consideration is in itself lawful, but where the mode is unauthorized, or where, because of some fiduciary relation between the parties, the law will not permit the contract to be made, nor countenance it when made. As to the first it is said: "A plaintiff cannot recover in a court of justice whose cause of action arises out of a contract between him and the defendant in fraud or to the prejudice of third persons." Of the second it has been declared: "Many contracts which are not against morality are still void as being against the maxims of sound policy." The first class of contracts embraces the infinite number of those made to further crime, or to interfere with the administration of the law, or to obstruct the course of justice, all contracts affecting the rights and prerogatives of the government, as well as the personal rights of the citizen. In the second class no baseness is inherent in the essence of the contract, but there is either some defect in the mode of creation or the manner of performance, or some incapacity in one or the other of the parties because of nonage, mental disability, or the fiduciary relation which they sustain to each other.²

So, although public policy is a doctrine on which courts and judges should proceed with caution, still there are many cases in which it has been applied.³ Marriage brokerage contracts,⁴ contracts in restraint of trade except those expressly permitted by the code,⁵ or in consideration of illicit cohabitation,⁶ or affecting public service,⁷ or such

2. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777, per Henshaw, J.

3. *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846 (enumerating instances in which doctrine has been applied).

4. *Morrison v. Rogers*, 115 Cal. 252, 56 Am. St. Rep. 95, 46 Pac. 1072. See MARRIAGE.

5. See *infra*, §§ 92-104.

6. See *infra*, § 82.

7. See *infra*, §§ 83-87.

contracts as may injuriously affect the administration of justice,⁸ as an agreement not to institute a public prosecution, to abate a public nuisance,⁹ or compounding a crime or which are made in consideration of such an agreement,¹⁰ and contracts as to the location of public buildings,¹¹ or of railroad termini or stations,¹² which are injurious to the public interests, afford instances of the application of the doctrine. So, too, any contract which involves a fraud on the rights of others is against public policy.¹³ This applies to agreements tending to prevent a person from performing his contracts,¹⁴ and the object of which is to prevent fair competition at public sales, or to inflate the value of property so offered for sale.¹⁵ Similarly, any agreement respecting government contracts to be awarded to the lowest bidder, which tends to deprive the government of the advantage of competition in the bidding, is unlawful and void. An agreement not to bid upon a contract which is to be awarded to the lowest bidder, and an agreement to withdraw a bid already made,

8. See *infra*, §§ 88-91.

9. *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 30 Pac. 550 (railroad track laid in street without authority).

10. *Thom v. Stewart*, 162 Cal. 413, 122 Pac. 1069; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398; *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677. See COMPOUNDING CRIMES; EXTORTION.

11. *Spence v. Harvey*, 22 Cal. 336. See also note, 13 A. L. R. 734.

12. *McCowen v. Pew*, 153 Cal. 735, 15 Ann. Cas. 630, 21 L. R. A. (N. S.) 800, 96 Pac. 893 (but declaring that public policy supports contracts made in inducement to the building of a railroad, between certain points, in the absence of a showing that they were made in disregard of the public convenience,

and in violation of the clear wants and necessities of the people). See *Green v. Brooks*, 81 Cal. 328, 22 Pac. 849 (holding that contract in consideration of information as to location of railroad depot is not void as against public policy, if it does not appear that any rights of the railroad company were affected by the giving of the information or that it was obtained through or given in violation of a relation of trust and confidence). See RAILROADS.

13. *Gugolz v. Gehrken*, 164 Cal. 596, 43 L. R. A. (N. S.) 577, 130 Pac. 8. See FRAUD AND DECEIT.

14. *Moody v. Newmark*, 121 Cal. 446, 53 Pac. 944. See also, note, 11 A. L. R. 706.

15. See AUCTIONS, vol. 3, p. 755; JUDICIAL SALES.

are subject to the same legal objections.¹⁶ And a contract infringing the personal liberty of a third party is void.¹⁷

But, it has been declared, a contract between real estate brokers to divide commissions on a sale of certain real estate being made is not illegal.¹⁸ Nor is an agreement to waive an option and permit a third person to purchase the subject matter thereof against public policy.¹⁹ And an agreement providing, among other things, for conveyances of land, is not void for the reason that one of the parties thereto agrees that he will procure the consent of his wife to the execution of certain conveyances therein provided to be made.²⁰

§ 73. Contracts in Fiduciary Capacity.—As indicated above, contracts of those who stand in a fiduciary relation to others, with such others, are generally regarded as against public policy.¹ The policy of the law does not allow one to gain anything from a relation conducive to bad faith and double dealing.² Nor does the law permit one who acts in a fiduciary capacity to deal with himself in his individual capacity; and express contracts thus made are contrary to public policy and void.³ Because of the tendency to abuse, the temptation to take undue advantage, these contracts, even when not expressly prohibited by law, are looked upon with disfavor, and they may be avoided at the instance of the other party in interest; but, where the trustee or other fiduciary agent

16. *Swan v. Chorpenning*, 20 Cal. 182.

17. *Dittrich v. Gobey*, 119 Cal. 599, 51 Pac. 962.

18. *West v. Visalia Abstract Co.*, 35 Cal. App. Dec. 612. See **BROKERS**, vol. 4, p. 611.

19. *Flint v. Giguere*, 33 Cal. App. Dec. 742, 195 Pac. 85.

20. *Armstrong v. Sacramento Valley Realty Co.*, 34 Cal. App. Dec. 884, 198 Pac. 217.

1. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777. See **TRUSTS**.

2. *Glenn v. Rice*, 174 Cal. 269, 162 Pac. 1020 (double agency).

3. *Wilbur v. Lynde*, 49 Cal. 290, 19 Am. Rep. 645. See **AGENCY**, vol. 1, p. 788; **BROKERS**, vol. 4, p. 567; **CORPORATIONS**; **EXECUTORS AND ADMINISTRATORS**; **GUARDIAN AND WARD**; **TRUSTS**. See, also, *supra*, §§ 42-45.

has fully carried out the terms of the contract, the contract itself being fair, public policy, which is not punitive, is satisfied to leave the right of rescission to the other party. If he shall elect to rescind, he does so upon the equitable condition of restoring what he has received.^{3a} If, however, he chooses to retain the consideration, he is not bound by the terms and conditions of the contract, but the courts permit an action to establish and to recover the reasonable value of the thing sold or the service rendered. Such, it has been said, is the general rule, but in California the line has been more closely drawn. Such contracts are against public policy. Being against public policy, the making of them is not to be encouraged. But to permit a profit is thus to encourage them. Therefore, when a recovery for property or services is permitted, it is not for the reasonable or market value of property or services, which naturally includes within it the contemplation of a profit, but, when possible, the recovery is limited to the actual cost.⁴

A receiver may, without violating his duty in his trust relation, act as agent for third parties in bringing about a purchase of the trust res.⁵ Nor is the employment by owners of one of several joint contractors as superintendent of building void as against public policy.⁶ But a contract for the construction of apparatus for a corporation, executed in the name of the corporation by its president and secretary, with a firm of which the presi-

3a. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 778 et seq., for discussion of abuse of fiduciary relation as ground for rescission of contract; and p. 763 et seq. of that article, as to restoration of benefits received as condition precedent to action for rescission of contract. See, also, *supra*, §§ 42-45, as to consent as affected by existence of fiduciary relation between parties to contract. And see DEEDS and WILLS for further discussion of undue in-

fluence. See *infra*, §§ 230-236, as to rescission of contracts generally.

4. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777, per Henshaw, J. (citing *Fox v. Hale etc. Min. Co.*, 108 Cal. 369, 41 Pac. 308). See *supra*, § 42, as to presumption of undue influence.

5. *De Jarnatt v. Peake*, 123 Cal. 607, 56 Pac. 467. See RECEIVERS.

6. *Shaw v. Andrews*, 9 Cal. 73.

dent is a member, is in breach of the fiduciary relation occupied by the president to the corporation and its stockholders, and is invalid without reference to its fairness or unfairness, and cannot be enforced against the corporation.⁷

§ 74. Agreements between Husband and Wife.—Notwithstanding the confidential relations which exist between husband and wife, separation agreements, providing for the division of all the community property of the parties, and obligating each of them not to assert any claim against the estate of the other, are not against public policy, and may be entered into and will be enforced in accordance with their terms when undue advantage has not been taken of either spouse. But the law is extremely solicitous about the maintenance of the marriage relation, and will not tolerate or sanction any contract which by its terms or obvious tendency has for its object the securing of a divorce. These subjects are fully considered in another article.⁸

§ 75. Agreements for Relief from Liability.—It is provided by section 1668 of the Civil Code that

“All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”⁹

It cannot be disputed that it is within the province of the legislature to declare such principle of public policy

7. *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 63 Pac. 1011 (but holding action in nature of quantum meruit would lie). See CORPORATIONS.

8. See DIVORCE AND SEPARATION. See *supra*, § 17, as to capacity of husband and wife to contract generally.

9. Civ. Code, § 1668; *Teachout v. Bogy*, 175 Cal. 481, 166 Pac. 319;

Dibble v. Reliance Life Ins. Co., 170 Cal. 199, Ann. Cas. 1917E, 34, 149 Pac. 171; *Union Const. Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242; *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913; *Scheeline v. Pezola*, 29 Cal. App. 266, 155 Pac. 127.

and that it should be enforced.¹⁰ It is a fundamental rule of law, however, that what one may refuse to do entirely he may agree to do on such terms as he pleases. Hence, one person, being under no legal duty to perform certain services for another, may, upon agreeing to perform such services, exempt himself from liability for his own negligence, providing, in view of the code section quoted above, there is no attempt to exempt himself from responsibility for any fraud or willful injury to the other person or his property, or to exempt himself from responsibility for any violation of the law, either willful or negligent.¹¹

By section 1668 of the Civil Code the legislature did not, it has been said, intend to condemn a contract that, in the interest of repose and security, would fix a reasonable limit for the time in which such defense might be successfully urged, but the intention was to preclude a contract that would altogether relieve either party of the consequences of his own fraud. "All contracts" certainly includes contracts of insurance,¹² and if this were not the correct interpretation these contracts would not stand the test, for such a contract necessarily has the tendency to lessen the care which the owner would otherwise exercise in the protection of his property from fire. Courts have sustained contracts made by common carriers with insurance companies, whereby property under their control, and in transit, has been insured against negligence of their employees.¹³ However, the California decisions, upholding the doctrine that a contract between a telegraph company and the sender of a message, whereby the company attempts to limit its liability for mistakes or delays in transmission or delivery, is lawful and binding upon all

10. See CONSTITUTIONAL LAW, vol. 5, p. 738.

11. *McCaslin v. Southern Pac. Co.*, 34 Cal. App. Dec. 851 (upholding contract of forwarder of goods). As to limitation of carrier's liability, see CARRIERS, vol. 4, p. 873.

12. *Dibble v. Reliance Life Ins. Co.*, 170 Cal. 199, Ann. Cas. 1917E, 34, 149 Pac. 171. See INSURANCE.

13. *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 29 L. R. A. 751, 41 Pac. 783.

senders of messages who assent to it, and that it exempts the telegraph company from liability, except as stated therein, for any cause except willful misconduct or gross negligence, are criticised, in view of the provisions of the Civil Code germane to the subject.¹⁴

§ 76. Particular Cases.—A contract whereby one party is to be under no liability for the loss of property stored upon its premises by the other, is not, it has been declared, against public policy, but is merely a common-sense mutual agreement between parties concerning their private affairs.¹⁵ So, too, the covenant in a contract of lease that a railroad company shall not be responsible for any damage caused by fire is valid, and not void as against public policy; nor are the dangers and risks to the public as to the destruction of its property by fire in any degree increased by the covenant between the parties.¹⁶ An agreement by an employer to pay an employee a certain sum per month for his services, even if he should be discharged for incapacity or dereliction of duty, is not contrary to public policy.¹⁷ But instruments, one of the objects of the execution of which is indirectly to relieve parties executing them from responsibility for a criminal violation of law, are void, under section 1668 of the Civil Code; and a recovery upon them will be defeated on that ground, although not relied upon as a defense to the action.¹⁸ An agreement to indemnify a party for a willful trespass about to be committed is against public policy

14. *Union Const. Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242. See TELEGRAPHS AND TELEPHONES.

15. *Northwestern Mutual Fire Assn. v. Pacific Wharf & Storage Co.*, 62 Cal. Dec. 331, 200 Pac. 934; *Id.*, 35 Cal. App. Dec. 104. See WAREHOUSES.

16. *Stephens v. Southern Pac. Co.*,

109 Cal. 86, 50 Am. St. Rep. 17, 29 L. R. A. 751, 41 Pac. 783. See FIRES.

17. *Edwards v. Crepin*, 68 Cal. 37, 8 Pac. 616. See MASTER AND SERVANT.

18. *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068. See COMPOUNDING CRIMES, vol. 5, p. 379.

and void.¹⁹ A provision in contract for street work that the contractor shall be liable for "all loss arising from nature of work" has been held to be void. Such a condition naturally tends to increase the cost of the work and to increase the burden of the property owner.²⁰

§ 77. Contracts not to Sue.—A covenant made by one person not to sue another for or in respect to any matter arising out of future contracts between them, or by reason of any future tort, would, it has been said, be utterly void, as the parties to such contract could not have in view any particular subject matter, or have any conception of the amount which might be involved in the causes of action upon which the covenant was to operate.¹ But the right to enforce any present obligation which one may have against another is his, and he may do with it as he sees fit. He may agree to relinquish it or insist on preserving it. Whichever course he deems proper to adopt is no matter of public concern, and affects no question of public policy.² The covenant by an heir not to contest the will of his ancestor is not void as against public policy, nor as against the policy of the law that an invalid will should not be established as a valid will; but is in harmony with the paramount public policy that parties shall have liberty to contract, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be

19. *Stark v. Raney*, 18 Cal. 622, (but holding that, an agreement to indemnify a sheriff for seizing property under execution is valid if the parties are in good faith seeking to enforce a legal right). See *LEVY AND SEIZURE*.

20. *True v. Fox*, 155 Cal. 534, 102 Pac. 263; *Stansbury v. Poindexter*, 154 Cal. 709, 129 Am. St. Rep. 190, 99 Pac. 182; *Van Loenen v. Gillespie*, 152 Cal. 222, 96 Pac. 87; *Hatch v. Nevills*, 7 Cal. Unrep. 341,

95 Pac. 43; *Woollacott v. Meekin*, 151 Cal. 701, 91 Pac. 612; *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091; *Blochman v. Spreckels*, 135 Cal. 662, 57 L. R. A. 213, 67 Pac. 1061.

1. *In re Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414. See *ARBITRATION AND AWARD*, vol. 3, p. 49.

2. *Smith v. MacDonald*, 37 Cal. App. 503, 174 Pac. 80.

enforced by the courts.³ It may be noted, though, that an agreement by one entitled, not to apply for letters testamentary, is against public policy.⁴

§ 78. Waiver of Statutory Protection.—The right of the state to direct that which is for the welfare of the general public cannot be abridged by contract stipulations between individuals. This is undoubtedly the case with respect to a law which is in the nature of a state police regulation. The public good is entitled to consideration; and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection.^{4a} But, although the requirements of a statute designed to secure general objects of policy or morals cannot be dispensed with by agreement, it is generally held that statutory provisions designed solely for the benefit of individuals may be waived by the persons for whose benefit they are designed. Thus, the statute limiting the time within which action shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form, by those who are entitled to it; and such waiver, when acted upon, becomes an estoppel to plead the statute.⁵ An agreement to waive the protection of the statute of limitations violates no principle of public policy, but, on the contrary, is one which every consideration of sound morals requires the court to enforce. The general rule applicable thereto is embodied in the maxim, "*Pacta legem faciunt inter partes.*"⁶ The mere acceptance of the

3. In *re* Garcelon, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414; *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379. See *WILLS*.

4. *Estate of True*, 120 Cal. 352, 52 Pac. 815. See *EXECUTORS AND ADMINISTRATORS*.

4a. See *CONSTITUTIONAL LAW*, vol. 5, p. 738.

5. *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439. See *LIMITATION OF ACTIONS*.

6. *State Loan etc. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600;

naked written promise of the obligor to waive the statute of limitations would not make it a binding contract; but the compliance of the obligee with the obligor's written request for delay, upon the faith of the promise, constitutes a sufficient consideration for the promise, and makes it effective to suspend the statute while the parties act as agreed.⁷ It is equally true that an agreement by which a creditor deprives himself of the power to enforce a debt, and confides the question of payment to the discretion of the debtor, is not void.⁸

§ 79. Contract Varying Will.—There can be no objection to a contract having for its sole purpose the disposition of property in a manner different from that proposed by a testator, even where the contract contemplates the rejection of the will when offered for probate, or its setting aside when admitted to probate, when it is entirely free from fraud, and is made by all the parties in interest. As has often been substantially said, the public generally has no interest in the matter of the probate of a will, and only those interested in the estate under the will or otherwise are affected by such a contract.⁹ If all interested parties agree upon some course to be followed, and their contract is otherwise free from contemplated fraud or violation of any law, no one else has any such interest as warrants complaint.¹⁰ But an agreement to resist the probate of a will and procure it to be set aside so as to cut

Wells, Fargo & Co. v. Enright, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439.

7. State Loan etc. Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600. See LIMITATION OF ACTIONS.

8. Smith v. MacDonald, 37 Cal. App. 503, 174 Pac. 80 (quoting Greenwood on Public Policy and the Law of Contracts).

9. Gugolz v. Gehrrens, 164 Cal. 596, 43 L. R. A. (N. S.) 577, 130

Pac. 8, per Angellotti, J. See supra, § 77, as to validity of agreement not to contest will. See WILLS as to validity of contract to make will.

10. Gugolz v. Gehrrens, 164 Cal. 596, 43 L. R. A. (N. S.) 577, 130 Pac. 8; Estate of Garcelon, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414; Spangenberg v. Spangenberg, 19 Cal. App. 439, 126 Pac. 379.

off the interest of one who is not a party to the agreement is against public policy.¹¹

§ 80. **Contracts for Services.**—As a general rule, there can be no recovery for personal services rendered under a contract which contravenes public policy, and the law will not imply a promise to pay for services which have been illegally rendered.¹² Thus a marriage brokerage contract is invalid as being contrary to public policy, and services rendered under such a contract are without legal consideration, and are incapable of forming the foundation of an action for their recovery.¹³ So, too, a contract by a third person, not an attorney, with an attorney, that he will procure the employment of the latter by a litigant, and that in consideration of such procurement he is to have from the attorney so employed one-third part of whatever remuneration the latter receives for his services, is contrary to public policy and invalid.¹⁴ Likewise, a contract, whether by administrator or heir, attempting to bind the estate to pay broker's commission, is void as against the policy of the law.¹⁵ And a contract made to render medical services with one who has not obtained a certificate, showing that he possesses the necessary qualifications,—who has not complied with the law,—is contrary to the policy thereof, and is therefore void.¹⁶ It has been held, however, that a contract for the employment of an architect is

11. *Gugolz v. Gehrrens*, 164 Cal. 596, 43 L. R. A. (N. S.) 577, 130 Pac. 8.

12. *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880. See **WORK AND LABOR**.

13. *Morrison v. Rogers*, 115 Cal. 252, 56 Am. St. Rep. 95, 46 Pac. 1072.

14. *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

15. *Danielwitz v. Sheppard*, 62

Cal. 339. See **EXECUTORS AND ADMINISTRATORS**, as to validity of contracts by executors and administrators generally. And see *Cole v. Superior Court*, 63 Cal. 86, 49 Am. Rep. 78 (holding that a guardian ad litem could not make a contract for legal services binding on the estate of the ward without the sanction of the court). See also **GUARDIAN AND WARD**.

16. *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880. See **PHYSICIANS AND SURGEONS**.

not rendered illegal or void because made in advance of the issuance of the certificate to the architect under the act of 1901 regulating the practice of architecture, though in order to carry out the contract it would be necessary for the architect to take out his certificate.¹⁷

§ 81. Assignments of Wages.—A contract to assign private wages to be earned under a future employment for an adequate consideration is not against public policy, and becomes operative in equity, when the subject matter of such wages becomes existent, and an authorized assignment thereof contracted for has been made.¹⁸ The doctrine is limited in California by the code section passed in 1913, which provides among other things that an assignment of wages must be in writing, and if the assignor be married, consented to by the other spouse and which also regulates assignments of wages by minors and refers to powers of attorney.¹⁹ There is a marked difference in the case of a public official, however, for the reason that the assignment of his salary to be earned tends to impair the efficiency of the public service, and therefore it is generally held to be void in law and equity as being against public policy.²⁰

There is nothing essentially immoral in a contract between employer and employee whereby the employee agrees to work for a certain wage and to surrender all tips to his employer. And since it is lawful, as between employer and employee, to provide for the ownership of tips given into the possession of the latter, it can hardly be said that the patron's ignorance of it makes the contract unlawful.¹

17. *Fitzhugh v. Mason*, 2 Cal. App. 220, 83 Pac. 282. See *ARCHITECTS*, vol. 3, p. 95. See *supra*, § 68.

18. *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956.

19. Civ. Code, § 955. See *ASSIGNMENTS*, vol. 3, pp. 245-247.

20. *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956. See *ASSIGNMENTS*, vol. 3, pp. 245-247.

1. *In re Farb*, 178 Cal. 592, 3 A. L. R. 301, 174 Pac. 320, per *Melvin, J.* See *MASTER AND SERVANT*.

§ 82. Contracts Involving Turpitude.—A court will not enforce an executory contract founded on the mutual turpitude of the parties, and if the contract has been executed, it will not aid either party to escape its consequences.² A contract which has the direct effect of promoting sexual immorality is against public policy.³ Thus a promise to marry, made in consideration of an agreement, on the part of the woman, to continue an immoral and illegal relation toward the promisor, is void.⁴ And a lease of a house for the purpose of conducting it as a house of prostitution, with the knowledge and consent of the lessor, is unlawful and void; and a court will not aid either party in an attempt to enforce such a contract.⁵ This rule is applicable also to a partnership to carry on the business of letting furnished apartments for illicit intercourse. The fact that tenements let are located in a section of the city which is mainly given up to such business without interference by the police does not make the partnership any the less unlawful.⁶

Contracts Affecting Public Service.

§ 83. Agreement to Influence Legislation—General Rule. All persons whose interest may, in any way, be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them before legislative committees, as well as in courts of justice.⁷

2. *Ager v. Duncan*, 50 Cal. 325 (fraud); *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913; *Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395 (refusing to award possession under bill of sale made to defraud creditors).

3. See *infra*, §§ 129, 130, as to legality of consideration.

4. *Hanks v. Naglee*, 54 Cal. 51;

Boigneres v. Boulon, 54 Cal. 146. See BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 455.

5. *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207.

6. *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015.

7. *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384 (quoting from *Marshall v. Baltimore & Ohio R. R.*

The general rule as to the validity of contracts to render such services is thus stated:

“The law also seeks to cast its protection around legislative sessions, and to shield them against corrupt and improper influences, by making void all contracts which have for their object to influence legislation in any other manner than by such open and public presentation of facts, arguments and appeals to reason as are recognized as proper and legitimate with all public bodies. While counsel may be properly employed to present the reasons in favor of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service, yet to secretly approach the members of such a body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views, is improper and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law.”⁸

§ 84. Lobbying Contracts.—Although there are certain legitimate modes of influencing legislation, it is not the policy of the law that the members of the legislature during the session should be subjected to the personal solicitation of experienced and paid lobbyists. The term “lobbying” has a well-defined meaning, and signifies to address or solicit members of a legislative body in the lobby or elsewhere with the purpose of influencing their votes.⁹ The constitution provides that: “Any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means, shall be guilty of lobbying, which is hereby declared a felony”;¹⁰ and section 89 of the Penal Code provides:

Co., 16 How. (U. S.) 314, 14 L. Ed. 953, see, also, Rose's U. S. Notes).

8. *County of Colusa v. Welch*, 122 Cal. 428, 55 Pac. 243 (quoting from *Cooley on Constitutional Limitations*).

9. *County of Colusa v. Welch*, 122 Cal. 428, 55 Pac. 243; *Le Tourneux v. Gilliss*, 1 Cal. App. 546, 82 Pac. 627. See *BRIBERY*, vol. 4, p. 482.

10. Art. IV, § 35; *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60; *Le*

"Every person who obtains or seeks to obtain money or other thing of value from another person, upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter, is guilty of a felony."

It is not material that the contract does not provide for acts to be done within the penal provisions of the constitution and the Penal Code.¹¹ The statute by making certain lobby practices criminal does not by implication legalize others not within the purview of the criminal law, which are void as against public policy.¹² A promissory note given to raise money for the purpose of carrying out a contract between the maker and payee for lobbying is given for a contract against public policy, which renders the consideration illegal.¹³

§ 85. Professional Services in Furthering Legislation.—

The employment of persons to influence legislation, or to influence decisions of the land department, or even the decisions of judicial tribunals, in a proper way, is not against sound public policy. A distinction is drawn between the use of personal, or any secret or sinister, influence upon legislators, by one who seeks the passage of an act, which is contrary to public policy, and the open advocacy of the same.¹⁴ It is generally agreed that the appearance of a representative of an interested party before a public body to urge the adoption of a particular measure or policy is neither illegal nor improper when the means employed are open and have for their purpose the presentation of the merits of the advocated matter.¹⁵

Tourneux v. Gilliss, 1 Cal. App. 546, 82 Pac. 627.

11. Le Tourneux v. Gilliss, 1 Cal. App. 546, 82 Pac. 627.

12. County of Colusa v. Welch, 122 Cal. 428, 55 Pac. 243; Le Tourneux v. Gilliss, 1 Cal. App. 546, 82 Pac. 627.

13. Le Tourneux v. Gilliss, 1 Cal. App. 546, 82 Pac. 627.

14. Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60.

15. Schweppe v. Sandberg, 34 Cal. App. Dec. 56, 195 Pac. 454 (agent employed by land owner to present merits of particular loca-

And it has been held that services rendered by an attorney in endeavoring to persuade the members of the legislature individually to act favorably upon a bill for the interest of a client, under a contract for compensation not contingent upon success, in which no dishonest, secret or unfair means were used, do not constitute "lobbying" within the meaning of the constitutional provision, and are not contrary to public policy.¹⁶ So, too, a contract by a person having timber-land entries, for the services of an attorney to influence the official action of the secretary of the interior favorably to the issuance of patents, without any stipulation for the use of improper means or methods, is not void as against good morals or public policy.¹⁷ Moreover, it would seem that when the proceedings are open and honest it is immaterial that the compensation is contingent upon successful results.¹⁸ The means and methods to be used must be improper, or else such employment is perfectly legitimate in the eyes of the law.¹⁹

§ 86. Contracts Affecting Compensation of Public Officers.—A person accepting a public office with the compensation fixed by law is bound to perform the duties for the compensation named and no other.²⁰ Hence, a contract which increases an officer's salary,¹ or provides for extra

tion for highway to public officers charged with duty of selecting same); *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784; *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 334 (agreement to draft bill for franchise and place it in hands of member of legislature for introduction therein held valid).

16. *County of Colusa v. Welch*, 122 Cal. 428, 55 Pac. 243; *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60.

17. *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784.

18. *Schweppe v. Sandberg*, 34 Cal. App. Dec. 56, 195 Pac. 454. As to validity of agreements for contingent fees generally, see *ATTORNEYS AT LAW*, vol. 3, p. 691.

19. *Schweppe v. Sandberg*, 34 Cal. App. Dec. 56, 195 Pac. 454; *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784.

20. See *PUBLIC OFFICERS*.

1. *County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 324; *Power v. May*, 114 Cal. 207, 46 Pac. 6.

compensation,² during the term of office is absolutely void as against public policy and cannot be enforced. Where the contract of a county officer for the preparation of the data for a claim against the state and for extra compensation therefor was entire and included extra work done both in the line of his official duty and outside thereof, which work was intermingled, it was held the entire contract for the extra compensation was illegal and void.³ But an agreement to compensate a deputy sheriff for procuring evidence which would lead to the conviction of a person implicated in a crime is not contrary to public policy if the crime was committed and the trial had in a county other than that in which the deputy sheriff was an officer. Such is not compensation for the performance of any duty enjoined upon him by law.⁴ Nor is an agreement by a constable with an execution creditor to charge less than his legal fees for levying an execution and conducting a sale thereunder contrary to public policy.⁵

An agreement by which a candidate for office receives from another person money to aid him in securing his election, and in consideration thereof agrees to share with such other person a portion of the proceeds and emoluments of the office when elected, it has been held, is immoral, against public policy, and *malum in se*, and is totally void.⁶

§ 87. Personal Interest of Officer in Contract With Public.—Any contract by a public officer which interferes with the unbiased discharge of his duty to the public in the

2. *Buck v. City of Eureka*, 109 Cal. 504, 30 L. R. A. 409, 42 Pac. 243.

3. *County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 324. See *infra*, §§ 129, 130, as to illegality of consideration.

4. *Harris v. More*, 70 Cal. 502, 11 Pac. 780.

5. *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037.

6. *Martin v. Wade*, 37 Cal. 168. See PUBLIC OFFICERS.

exercise of his office is against public policy, and is void.⁷ The code provides:

“Members of the legislature, state, county, city and township officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.”⁸

Every contract made in violation of this provision may be avoided at the instance of any party except the officer interested therein.⁹ A postmaster is a public officer, and is bound to exercise his judgment for the public benefit in fixing the location of his office, and any contract by which this exercise of his judgment is sold for his private emolument interferes with the discharge of his official duties and is therefore void.¹⁰ In some instances where contracts of officials with their counties or municipalities have not been expressly forbidden by law, a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a quantum meruit or quantum valebat.¹¹ The question of the validity of the contract does not, however, depend upon whether it can be shown that the public has in fact suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public, and one which public policy requires should not be made by public officers in regard to the discharge of their duties.¹²

7. *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Edwards v. Estell*, 48 Cal. 194; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69. See PUBLIC OFFICERS.

8. Pol. Code, § 920; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777.

9. Pol. Code, § 922; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St.

Rep. 31, 45 L. R. A. 420, 57 Pac. 777.

10. *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69.

11. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777 (citing cases decided in foreign jurisdictions).

12. *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69.

Contracts Affecting the Administration of Justice.

§ 88. **Generally.**—Contracts which have a tendency to obstruct or interfere with the administration of justice are clearly against public policy. It has been expressly held that an agreement to resist the probate of a will and procure it to be set aside so as to cut off the interest of one who is not a party to the agreement is against public policy as tending to thwart justice.¹³ But a contract between a banker and depositor by which the former obligates himself to pay interest on money left by the latter on deposit pending an appeal in certain litigation with a third party, in the event that the appeal is affirmed, and no interest if the judgment is reversed, is not void as tending to encourage litigation or as being in the nature of a gambling contract.¹⁴

§ 89. **Ousting Jurisdiction of Court.**—The agreements of parties cannot divest courts of their proper jurisdiction.¹⁵ After a right has accrued or an obligation has been incurred, a party may waive his rights or refuse or neglect to enforce them, or he may by contract bind himself to submit the matter to arbitration or other special remedy. But it is not permissible for persons to stipulate in advance that, in the event of differences arising in the future, they will deny themselves the right to resort to the courts for their settlement.¹⁶ This principle has been extended to an agreement to submit to arbitration controversies which may arise between the parties.¹⁷

13. *Gugolz v. Gehrkens*, 164 Cal. 596, 43 L. R. A. (N. S.) 577, 130 Pac. 8 (citing cases decided in other jurisdictions). See *WILLS*.

14. *Cloyne v. Levy*, 26 Cal. App. 637, 148 Pac. 224.

15. *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313. See *COURTS*.

16. *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54.

17. *California Annual Conference of M. E. Church v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Old Saucelito Land & D. D. Co. v. Commercial Union Assurance Co.*, 66 Cal. 253, 5 Pac. 232; *Loup v. California S. R. R. Co.*, 63 Cal. 97; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54. See *ARBITRATION AND AWARD*, vol. 3, p. 27.

However, the modern view is that it is allowable for parties to make such agreements in reference to preliminary and incidental matters of dispute, so long as they retain the right to appeal to the courts for the determination of any substantive question of liability.¹⁸ The distinction between the two classes of cases has been said to be marked and well defined. In one class, the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all difference by arbitration, to the exclusion of the courts; and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right, by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained; and this is made a condition precedent, either in terms or by necessary implication. This condition being lawful, the courts have never hesitated to give full effect to it.¹⁹

§ 90. Procuring Evidence.—Anyone has a right, when threatened with litigation, or desiring himself to sue, to employ assistance with a view of ascertaining facts as they exist, and to find and procure the presence of witnesses who know of facts and will testify to them. Any other rule, it has been argued, would leave the parties in a suit, restricted to their own individual efforts to obtain existing evidence, which would be absurd. The employment by a husband of third persons to locate, interview and secure witnesses to testify in his behalf in a divorce action, for a fixed compensation, regardless of whether they obtain any information or procure any witnesses, is not against public policy.²⁰ The further proposition, extending to all kinds of litigation, is equally true, that a

18. *Old Saucelito Land & D. D. Co. v. Commercial Union Assurance Co.*, 66 Cal. 253, 5 Pac. 232. 38 Am. Rep. 54. See *ARBITRATION AND AWARD*, vol. 3, p. 49.

19. *Holmes v. Richet*, 56 Cal. 307, 20. *Hare v. McGue*, 178 Cal. 740, L. R. A. 1918F, 1099, 174 Pac. 663.

contract is void whereby one agrees to obtain or procure testimony of certain facts which will successfully support or defeat a lawsuit,¹ or which provides that payment to the party procuring such testimony is to be contingent upon the result of the action for which he is engaged to procure it. It is the element of payment contingent on the success of the litigation, or the fact that the agreement is to procure evidence, not of facts as they exist, but of particular facts necessary to the success of the litigant who contracted for their production, which vitiates the contract.² Contracts the object of which is the procurement of false witnesses or the presentation of evidence of nonexistent facts, are clearly illegal.³

§ 91. Suppressing Evidence.—All contracts to suppress testimony that is competent and relevant in a judicial investigation are contrary to public policy. A promise to pay for the concealment from the court and the parties of a fact material to the rights of said parties, and which it is the promisor's duty to make known, is against public policy, and neither party should receive the aid of the courts to enforce it.⁴ And an agreement to withdraw depositions from the archives of the land commission is void as against public policy.⁵ A contract between a purchaser at a partition sale and one of the parties to the suit, who was about to contest the confirmation of the sale for inadequacy of the price bid, to the effect that said party, in consideration of a sum to be paid in addition for her interest, would refrain from contesting the confirmation, is a contract for the concealment of a material fact which it was the duty of the contracting

1. *Hare v. McGue*, 178 Cal. 740, L. R. A. 1918F, 1099, 174 Pac. 663; *Patterson v. Donner*, 48 Cal. 369.

2. *Hare v. McGue*, 178 Cal. 740, L. R. A. 1918F, 1099, 174 Pac. 663.

3. *Schweppe v. Sandberg*, 34 Cal. App. Dec. 56, 195 Pac. 454.

4. *Tappan v. Albany Brewing*

Co., 80 Cal. 570, 13 Am. St. Rep. 174, 5 L. R. A. 428, 22 Pac. 257; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229 (collusive divorce); *Valentine v. Stewart*, 15 Cal. 387.

5. *Valentine v. Stewart*, 15 Cal. 387.

party to make known, and is void as against public policy, and neither party will receive the aid of the courts to enforce it.⁶

Contracts in Restraint of Trade and Alienation.

§ 92. **Development of Doctrine.**—At an early period in English jurisprudence, when trade and the mechanic arts were in their infancy, it was deemed a matter of public importance to encourage their growth and to prohibit contracts which tended to abridge them.⁷ Hence the rule first established was, that all contracts were void which in any degree tended to the restraint of trade, even in a particular, circumscribed locality, either for a definite or unlimited period.⁸ But as population and trade increased, and there was consequently a greater competition, the necessity for the stringent rule had in a great measure ceased, and the rule itself was greatly relaxed and modified,⁹ so as to countenance contracts for the partial restraint of trade,—that is, contracts in which the restraint was confined to reasonable limits of time or place, and which were founded upon sufficient consideration.¹⁰

Hence, it has been repeatedly decided both in England and America that whilst a contract by an artisan not to follow his calling at any time or place was an unreasonable restraint upon trade, contrary to public policy, and therefore void, nevertheless if he contracted for a valuable consideration not to pursue his occupation within certain reasonable, restricted limits, the contract was valid and

6. *Tappan v. Albany Brewing Co.*, 80 Cal. 570, 13 Am. St. Rep. 174, 5 L. R. A. 428, 22 Pac. 257.

7. *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186.

8. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186; *California Steam*

Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511.

9. *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186; *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511.

10. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581.

would be enforced.¹¹ In these cases the doctrine seems to be that there must not only be a consideration for the contract, but there must be some good reason for entering into it; and it must impose no restraint upon one party, which is not beneficial to the other. Such a contract confers no monopoly; it gives an exclusive enjoyment of the business only as against a single individual, while all the world besides is left at full liberty to enter upon the same enterprise.¹²

The rule, however, was uncertain and led to much perplexing legislation, and the law upon the subject is now declared in section 1673 of the Civil Code.¹³

§ 93. Statutory Rule.—The tendency of the modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade. It is not every limitation on absolute freedom of dealing that is prohibited.¹⁴ But a contract in restraint of trade, otherwise than as expressly excepted in sections 1674 and 1675 of the Civil Code, is against public policy, and void by the terms of section 1673 of the same code.¹⁵ That section is as follows:

“Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.”¹⁶

11. *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186.

12. *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511.

13. *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581. See *infra*, § 93.

14. *Grogan v. Chaffee*, 156 Cal. 611, 27 L. R. A. (N. S.) 395, 105 Pac. 745. But see *infra*, § 103.

15. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; *Du Bois v. Padgham*, 18 Cal. App. 298, 123 Pac. 207; *Prior v. Diggs*, 3 Cal. Unrep. 565, 31 Pac. 155. See **MONOPOLIES AND COMBINATIONS** for discussion of contracts tending to stifle competition.

16. *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416; *Chamberlain*

The only exceptions contemplated by the succeeding sections are to the effect that a vendor who sells the goodwill of his business may agree not to carry on a similar business within a single specified county or city, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein;¹⁷ and that a partner, in anticipation of the dissolution of the firm, may agree not to carry on a similar business within the city where the partnership business was transacted.¹⁸ Saving these two classes of agreements, all contracts which restrain the exercise of a lawful business, trade or vocation, are void.¹⁹ Section 1673 of the Civil Code makes no exception in favor of contracts only in partial restraint of trade.²⁰

The language of the code is to receive a reasonable construction so as to effect the end for which the legislature says such contracts may be made, and to give reasonable protection to him in whose favor such a contract is executed.¹ But the rule of liberal construction is in aid of

- v. Augustine, 172 Cal. 285, 156 Pac. 479; Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; Grogan v. Chaffee, 156 Cal. 611, 27 L. R. A. (N. S.) 395, 105 Pac. 745; Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582; United States Consolidated Seeded Raisin Co. v. Griffin & Skelley Co., 126 Fed. 364, 61 C. C. A. 334 (holding covenants to pay royalty upon use of, and covenant not to sublet, patented machines, which formed subject matter of contract were valid and subsisting and unaffected by section 1673 of the Civil Code). See ASSIGNMENTS, vol. 3, p. 242, as to assignment of contract in restraint of trade.
17. Getz Bros. & Co. v. Federal Salt Co., 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416. See *infra*, §§ 96-99.
18. Getz Bros. & Co. v. Federal Salt Co., 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416. See *infra*, § 100.
19. Santa Clara Mill etc. Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; Getz Bros. & Co. v. Federal Salt Co., 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416.
20. Chamberlain v. Augustine, 172 Cal. 285, 156 Pac. 479.
1. Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662; Brown v. Kling, 101 Cal. 295, 35 Pac. 995.

agreements falling within the permitted exceptions of the code as to contracts in restraint of trade, and does not apply to cases not falling within those exceptions.²

§ 94. **Basis of Rule.**—The rule making contracts in restraint of trade-void is not based upon any consideration for the party against whom the relief is sought, but upon considerations of sound public policy.³ It proceeds upon the theory that the public welfare demands that private citizens should not be allowed, even by their own voluntary contracts, to restrain themselves unreasonably from the prosecution of trades, callings or professions, or from embarking in business enterprises in the promotion and encouragement of which the public has an interest; that though for the present a person may intend and desire to abandon his trade or calling, as he has the right to do, the law, on grounds of public policy, will not allow him to bind himself not to resume his avocation if he shall afterwards elect to do so.⁴

To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and to be limited to what is fairly necessary, under the circumstances of the particular case, for the protection of the covenantee. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained.⁵ It has been said that no better test can be applied to the question than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of

2. *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468. 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708.

3. *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*, 60 Cal. Dec. 381, 192 Pac. 847; *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164,

4. *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186.

5. *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041; *Grogan v. Chaffee*, 156 Cal. 611, 27 L. R. A. (N. S.) 395, 105 Pac. 745.

whom it is given, and not so large as to interfere with the interests of the public.⁶ It must be taken to be settled that sections 1673, 1674, 1675 of the Civil Code, relating to contracts in restraint of trade, are to be construed in the light of these principles.⁷

Partial restraint.—A contract restraining one from following a lawful trade or calling at all is invalid because it discourages trade and commerce, and prevents the party from earning a living; but the right to agree to refrain from his calling, within reasonable limits as to space, may have the contrary effect. Such an agreement not only does not obstruct trade, but is oftentimes requisite and necessary, as well for the advantage of the public as of the individual. It encourages trade, for it gives value to a custom or business built up by making it vendible.⁸ One would have an inducement, therefore, to serve the public honestly and efficiently, for he is not only profiting by the business, but the custom attracted by so doing is valuable even after he is ready to retire from business.⁹ And, besides, as has been pointed out, the rule enables him to find a purchaser who will also have an interest in so serving the public.¹⁰

§ 95. Status of Agreement in Restraint of Trade.—A contract in restraint of trade was not at common law an illegal contract, nor is such a contract declared by the statute to be illegal.¹¹ The contracts which are, by sec-

6. City Carpet Beating etc. Works v. Jones, 102 Cal. 506, 36 Pac. 841; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36.

7. Grogan v. Chaffee, 156 Cal. 611, 27 L. R. A. (N. S.) 395, 105 Pac. 745; Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730.

8. Franz v. Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; Merchants' Ad-Sign Co. v. Sterling, 124

Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468; City Carpet Beating etc. Works v. Jones, 102 Cal. 506, 36 Pac. 841; Ragsdale v. Nagle, 106 Cal. 332, 39 Pac. 628; Brown v. Kling, 101 Cal. 295, 35 Pac. 995.

9. Brown v. Kling, 101 Cal. 295, 35 Pac. 995.

10. Brown v. Kling, 101 Cal. 295, 35 Pac. 995.

11. City Carpet Beating etc. Works v. Jones, 102 Cal. 506, 36

tion 1673 of the Civil Code, declared void are not declared unlawful.¹² Furthermore, the statute does not provide that such contracts, though not in accordance with the code, shall be wholly void. It says they shall be "to that extent void."¹³ They are simply void so far or to the extent that they exceed the restrictions imposed by the statute.¹⁴ The statute imposes no penalty upon the purchaser of a business under such contract, nor could it require the seller to resume business.¹⁵ The only penalty which contracts in restraint of trade entail is that courts refuse to enforce them, just as they refuse to enforce any contract which is opposed to public policy or good morals. There can be no proceeding to confiscate or destroy, either wholly or partially, the property which is the subject of such a contract.¹⁶ So far the legislature has seen fit to attach no other punishment to contracts of natural persons in restraint of trade than to make them nonenforceable, "and where the legislature has stopped, it is not only becoming, but necessary, that the courts should stop."¹⁷

In view of these principles it is obvious that a contract in restraint of trade is entirely void where it is indivisible and the consideration is illegal;¹⁸ but such a contract may be sustained in the part not prohibited by the statute when it is severable.¹⁹

Pac. 841; *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186.

12. *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995.

13. *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162; *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995.

14. *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995.

15. *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841.

16. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121;

Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186.

17. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

18. *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416; *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Santa Clara Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Prost v. More*, 40 Cal. 347; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621.

19. *McVicker v. McKenzie*, 136 Cal. 656, 69 Pac. 495; *Franz v.*

§ 96. Agreement Ancillary to Sale of Goodwill.—Section 1674 of the Civil Code, with reference to contracts in restraint of trade, makes an exception in favor of one who sells the goodwill of a business whereby he may agree not to carry on a similar business within a specified county or city, or a part thereof, while the buyer, or his assigns, carries on a like business therein.²⁰ Reading the sections 1673 and 1674 together, they have been briefly paraphrased as follows: Every contract by which anyone is restrained from exercising a lawful business is to that extent void, except where he has sold the goodwill of a business, in which case, as to that or similar business, he may agree not to engage therein so long as the buyer carries on a like business within specified limits.¹ Where a contract for the sale of a goodwill and to refrain from carrying on a similar business goes beyond the scope of the law in certain particulars, it is nevertheless valid in all those particulars in which it falls within the provisions of the law.² Thus a contract not to engage in the occupation of a second-hand dealer, so long as the purchaser continues in such business, without restricting it to "similar business" as provided in section 1674 of the Civil Code, is not wholly void, on that account, but only to the extent to which it attempted to enlarge the rights of the purchaser beyond the statute.³ It has been held that section 1674 of the

Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662; Ragsdale v. Nagle, 106 Cal. 332, 39 Pac. 628; City Carpet Beating etc. Works v. Jones, 102 Cal. 506, 36 Pac. 841; Brown v. Kling, 101 Cal. 295, 35 Pac. 995. And see *infra*, §§ 97, 98.

20. Chamberlain v. Augustine, 172 Cal. 285, 156 Pac. 479; Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468; City Carpet Beating etc. Works v. Jones, 102 Cal. 506, 36 Pac. 841; Akers v. Rappe, 30 Cal. App. 290, 158 Pac. 129;

Prior v. Diggs, 3 Cal. Unrep. 565, 31 Pac. 155. And see note, 3 A. L. R. 250.

See *infra*, § 270, as to breach of agreement not to engage in business.

1. Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468.

2. Ragsdale v. Nagle, 106 Cal. 332, 39 Pac. 628; Brown v. Kling, 101 Cal. 295, 35 Pac. 995. See *infra*, §§ 97, 98.

3. Shafer v. Sloan, 3 Cal. App. 335, 85 Pac. 162.

Civil Code is broad enough to include the business of abstracting.⁴

§ 97. **Territorial Extent.**—Prior to the adoption of the code a contract in restraint of trade which was not by its terms limited as to the territory embraced in its operation was not enforced. It was declared that such a contract, to be upheld, had to be restricted as to territory, and that it must appear to the court, in considering the nature of the business in connection with the territorial limits assigned, that the limits designated were not unreasonable in extent. A covenant that defendant should not engage in “any branch of the yeast powder business” was held void.⁵ Likewise, a contract by which one of the parties bound himself not to engage in a particular business or occupation “in the City and County of San Francisco, or State of California,” was held to be in restraint of trade, and void.⁶ Moreover, it was declared that such a contract was entire, and could not be severed so as to enforce that portion relating to the city and county of San Francisco, and reject that relating to the state of California.⁷

The code introduces no new principle; it simply eliminates from the controversy arising upon such restriction the question as to what is a reasonable territorial limit, by specifically defining it, and thus preventing litigation; and in this the statute has been said to be wise and salutary, even though in certain cases it gives the purchaser less than he bought and less than he might enjoy without violating the interests of the public.⁸ But it is held that the covenant is divisible as regards space, and void only to the extent to which it departs from the provisions of the code.⁹ The

4. *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628.

5. *Callahan v. Donnelly*, 45 Cal. 152, 13 Am. Rep. 172.

6. *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621.

7. *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621.

8. *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841. See *supra*, § 93.

9. *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841.

description of the territory is good as to all of it that lies within a specified county, such boundaries being capable of exact ascertainment, the code permitting the restriction to extend to "a specified county, city, or a part thereof."¹⁰ So where the covenant extended to three counties, it was held valid as to the county in which the place of business was situated.¹¹ And a covenant not to carry on a rival business within a specified radius from a place of business in any direction is valid as to the portion of the specified area which is situated within the county in which the central point is located.¹² When confined within reasonable limits (and as to what is reasonable the statute is conclusive), the public, as well as the parties, are benefited, and are therefore interested in sustaining such contracts as are or may be brought within the statutory restrictions where the contract admits of division.¹³ It is obvious that in some instances a division of a covenant as to space may be difficult to make.¹⁴

§ 98. Duration.—Whatever difficulty exists in limiting as to space a contract in restraint of trade, where there is no restriction it may readily be limited as to time, so as to be enforced to the extent to which it is limited by the statute, for the protection of the purchaser while engaged in the business within the limited territory. One rule at common law applicable to this matter was that the restraint shall be no greater than is necessary to protect the purchaser. This rule would limit the restraint to the time during which the purchaser or his assignee is in business, for beyond that time there is nothing to protect.¹⁵ Under

10. Civ. Code, § 1674; *Franz v. Works v. Jones*, 102 Cal. 506, 36 Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 841.

11. *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841.

12. *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466.

13. *City Carpet Beating etc.*

14. *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995.

15. *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995 (holding restraint for period of three years not unreasonable).

sections 1673 and 1674 of the Civil Code, a provision in a contract of sale of goodwill, by the terms of which the seller agrees not to engage in the business in a particular county, without limiting his covenant to the time during which the buyer might carry on the business, is not entirely void, but is enforceable against the seller so long as the buyer or any person deriving title from him carries on a like business in the county.¹⁶ And where the contract provides that the vendor shall not engage in the business for a period of ten years, a decree enjoining the defendant from carrying on a rival business until the expiration of the time limited, should be modified to conform with the statute as to time, viz., that it should continue so long as the plaintiff or anyone deriving title to the goodwill from the plaintiff carries on the business, not exceeding ten years from the date of the contract.¹⁷ It has been held that a contract not to engage in the same business for the period of twenty years in the city in which a business sold was conducted is not void on the ground that the time is unreasonably long, where the successors in interest, after the lapse of six years of the time, are still conducting the original business.¹⁸

§ 99. To What Capacities Restraint Extends.—While contracts not to engage in business receive strict construction, yet their legitimate aim and end are not to be lost sight of. They are designed to secure to the business of one person immunity from rivalry and consequent damage at the hands of another who would be a competitor. The provisions of the code authorize the execution of a contract by which one agrees not “to carry on” a similar business. It is too narrow a construction to say that this is limited to the carrying on of a business as owner or proprietor. To conduct, manage or operate it wholly or in

16. *Gregory v. Spieker*, 110 Cal. Works v. Jones, 102 Cal. 506, 36 150, 52 Am. St. Rep. 70, 42 Pac. Pac. 841.

17. *City Carpet Beating etc.* 290, 158 Pac. 129.

18. *Akers v. Rappe*, 30 Cal. App.

part, as the agent of another, is equally within the purpose and language of the code. Agency, however, is a general term, and servants and clerks are agents of their employers. Hence, an inhibition of agency in a contract not to establish, carry on, conduct or maintain a rival business, or act as agent therefor, for a period of three years, and a decree enforcing such contract according to its terms, are to be construed as prohibiting only an agency wholly or partially for the conduct of the business, and not as prohibiting employment as a mere servant or clerk, though such employment may fall within the more enlarged meaning of agency as a general term.¹⁹

§ 100. Agreement Ancillary to Sale of Partnership Interest.—A partner, as such, has not authority to dispose of the goodwill of the partnership business unless his copartners have wholly abandoned the business to him or are incapable of acting.²⁰ But "Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof."¹ Where, however, a sale is not one in anticipation of the dissolution of a copartnership, but is merely the sale by one stockholder to another of his interest in a corporation, accomplished by the transfer of his shares of stock, the agreement not again to engage in business is void.²

19. *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662, per Henshaw, J. See AGENCY, vol. 1, p. 690.

20. Civ. Code, § 2430; *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468. See PARTNERSHIP.

1. Civ. Code, § 1675; *Chamberlain v. Augustine*, 172 Cal. 285, 156 Pac. 479; *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468; *City Carpet Beating etc.*

Works v. Jones, 102 Cal. 506, 36 Pac. 841. See, also, note, 3 A. L. R. 250.

2. *Cavasso v. Downey*, 31. Cal. App. Dec. 381, 188 Pac. 594; *Chamberlain v. Augustine*, 172 Cal. 285, 156 Pac. 479; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468; *Downey v. Cavasso*, 36 Cal. App. 316, 171 Pac. 1077.

While under section 1674 of the Civil Code one other than a partner may, where he sells the goodwill of a business, make a valid contract to refrain from carrying on a business similar to that sold within a specified county or city, the territorial limits as to which a partner, may, by contract, restrict himself is, under section 1675 of that code, limited to a city or town.³ A complaint against a retiring partner who sold the goodwill of the business of publishing a directory in a specified city, and in soliciting contracts for advertising therefor throughout the county, which alleges a breach by entering into the publication of a directory in the county and in soliciting advertising therefor, but does not state that he published a directory for the same city, or sold any directory therein or solicited advertising therein, states no cause of action under section 1675 of the Civil Code for breach of the contract for sale of the goodwill of the partnership in the city.⁴

§ 101. Agreement Ancillary to Sale of Stockholder's Interest.—The vendor of stock in a trading corporation has no vendible interest in the goodwill of the business, and cannot transfer such goodwill; and an agreement by such vendor not to engage in a similar business in the city where the business of the corporation is carried on so long as the vendor or his successor in interest should carry on a like business therein, not being within any statutory exception, is void, as being in restraint of trade, and cannot be enforced.⁵ So an agreement by the seller of stock in a manufacturing corporation, whereby he covenants to pay to the purchaser a specified sum as liquidated damages in the event that he, within a period of three years, becomes

3. *Du Bois v. Padgham*, 18 Cal. App. 298, 123 Pac. 207.

4. *Du Bois v. Padgham*, 18 Cal. App. 298, 123 Pac. 207. See *infra*, § 270, as to breach of agreements not to engage in business.

5. *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468. See, also, note, 3 A. L. R. 250.

directly or indirectly interested in any business carried on in the states of California, Oregon or Washington, similar to the business of the corporation whose stock was sold, is void, under section 1673 of the Civil Code, as operating to restrain the seller from exercising a lawful profession, trade or business. And although the covenant with respect to liquidated damages is not expressly cast in the negative and the contract in form is merely an agreement that if the promisor does engage in such business he will pay a sum as liquidated damages, none the less it is a contract to restrain the person from carrying on the business mentioned.⁶ It has been declared that in an action on a promissory note executed by the defendant to the plaintiff as part consideration for plaintiff's interest in a certain corporation as represented by certain shares of stock held by him therein, which were purchased by defendant under an agreement whereby plaintiff bound himself not to engage in any business in competition with such corporation for a period of five years, the plaintiff's violation of such clause is not a matter which can be made the subject of a cross-complaint by the defendant.⁷

§ 102. Ancillary Agreement not to Interfere With Patent.—It has sometimes been stated that the rule concerning contracts in restraint of trade being void does not apply to patent rights; but as applied in the adjudicated cases, this means only that a trader may sell a patent right, and restrain himself generally from the use of it, or from other acts which would lessen the value of the patent sold. And, of course, as a patent is a sort of monopoly, the owner may manufacture under it, or not, as he pleases, and may make either a partial or entire assignment of it, and may protect his assignee, not only by an agreement not to use the patent, but by a covenant not to interfere with the profits to be derived from the assigned patent. But it

6. *Chamberlain v. Augustine*, 172 Cal. 285, 156 Pac. 479.

7. *Cavasso v. Downey*, 40 Cal. App. 521, 180 Pac. 950.

seems that none of the cases hold that several persons can legally enter into a combination to control the manufacture, or sale, or price of a staple of commerce merely because some of the parties have letters patent for certain grades of that staple. The rule upon the subject is expressed in the maxim, "*ex turpi causa non oritur actio*"; and a court will leave the parties to such contract exactly where it finds them.⁸

§ 103. Restricting Use or Sale of Property.—Under the doctrine of the California decisions the rule invalidating certain contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673 of the Civil Code makes void every contract by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances; but this, it has been said, is far different from a contract limiting his right to dispose of a particular piece of property, except upon certain conditions. As the owner of property has the right to withhold it from sale, it is argued, he may also, at the time of its sale, impose conditions upon its use without violating any rule of public policy.⁹ Thus, it is held, a manufacturer of an article, in a quantity relatively small in comparison with the total amount manufactured or sold in the market supplied by him, may sell his product on the condition that the buyer shall not resell it

8. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581, per McFarland, J. See PATENTS.

9. *Grogan v. Chaffee*, 156 Cal. 611, 27 L. R. A. (N. S.) 395, 105 Pac. 745 (upholding contract between manufacturer of olive oil, having secret process, and retail dealer stipulating that latter should not sell the oil for less than price fixed); *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 56 Am.

St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582 (holding that it is not illegal or against public policy to separate the voting power from the ownership of stock, by an irrevocable proxy given upon a sufficient consideration, when it is not appointed for an unlawful purpose, or where no unlawful end is attempted to be effected by the exercise of the voting power). As to separation of voting power of stock from ownership thereof, see CORPORATIONS.

at less than a certain minimum price.¹⁰ Moreover, it is declared that such an agreement is not unenforceable as being in restraint of trade, either under the common law or the act of congress, known as the Sherman Anti-trust Act; and that where it appears that the only object of such agreement is to enable the manufacturer to conduct his business at a reasonable profit, the agreement is not within the prohibitory provision of the so-called Cartwright Act.¹¹

These views do not, however, accord with those of the supreme court of the United States.¹²

10. *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 335, 128 Pac. 1041 (ground chocolate); *Grogan v. Chaffee*, 156 Cal. 611, 27 L. R. A. (N. S.) 395, 105 Pac. 745 (olive oil); *Munter v. Eastman Kodak Co.*, 28 Cal. App. 660, 153 Pac. 737. See, also, *MONOPOLIES AND COMBINATIONS*.

11. *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

12. See *United States v. Schrader's Son*, 252 U. S. 85, 64 L. Ed. 471. In this case the supreme court seems to settle the meaning of its earlier rulings upon the subject and declares against the validity of contracts fixing the resale prices of manufactured articles, although according to the manufacturer the right to specify resale prices, and to refuse to deal with those who refuse to observe them.

See, also, the recent case, *Federal Trade Commission v. Beech-Nut Packing Co.*, 284 U. S. 411, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121, 3122, 3123, 3124, 3125, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160, 3161, 3162, 3163, 3164, 3165, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 3180, 3181, 3182, 3183, 3184, 3185, 3186, 3187, 3188, 3189, 3190, 3191, 3192, 3193, 3194, 3195, 3196, 3197, 3198, 3199, 3200, 3201, 3202, 3203, 3204, 3205, 3206, 3207, 3208, 3209, 3210, 3211, 3212, 3213, 3214, 3215, 3216, 3217, 3218, 3219, 3220, 3221, 3222, 3223, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241, 3242, 3243, 3244, 3245, 3246, 3247, 3248, 3249, 3250, 3251, 3252, 3253, 3254, 3255, 3256, 3257, 3258, 3259, 3260, 3261, 3262, 3263, 3264, 3265, 3266, 3267, 3268, 3269, 3270, 3271, 3272, 3273, 3274, 3275, 3276, 3277, 3278, 3279, 3280, 3281, 3282, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3296, 3297, 3298, 3299, 3300, 3301, 3302, 3303, 3304, 3305, 3306, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317, 3318, 3319, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329, 3330, 3331, 3332, 3333, 3334, 3335, 3336, 3337, 3338, 3339, 3340, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348, 3349, 3350, 3351, 3352, 3353, 3354, 3355, 3356, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3438, 3439, 3440, 3441, 3442, 3443, 3444, 3445, 3446, 3447, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471, 3472, 3473, 3474, 3475, 3476, 3477, 3478, 3479, 3480, 3481, 3482, 3483, 3484, 3485, 3486, 3487, 3488, 3489, 3490, 3491, 3492, 3493, 3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508, 3509, 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3517, 3518, 3519, 3520, 3521, 3522, 3523, 3524, 3525, 3526, 3527, 3528, 3529, 3530, 3531, 3532, 3533, 3534, 3535, 3536, 3537, 3538, 3539, 3540, 3541, 3542, 3543, 3544, 3545, 3546, 3547, 3548, 3549, 3550, 3551, 3552, 3553, 3554, 3555, 3556, 3557, 3558, 3559, 3560, 3561, 3562, 3563, 3564, 3565, 3566, 3567, 3568, 3569, 3570, 3571, 3572, 3573, 3574, 3575, 3576, 3577, 3578, 3579, 3580, 3581, 3582, 3583, 3584, 3585, 3586, 3587, 3588, 3589, 3590, 3591, 3592, 3593, 3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3702, 3703, 3704, 3705, 3706, 3707, 3708, 3709, 3710, 3711, 3712, 3713, 3714, 3715, 3716, 3717, 3718, 3719, 3720, 3721, 3722, 3723, 3724, 3725, 3726, 3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859,

§ 104. Restriction must be Reasonable.—Although recognizing the general validity of contracts restricting the use or sale of property,¹³ the California courts take the attitude that the restrictions must be reasonable to be valid. While the owner of a steamboat has the right to keep her idle, or to destroy her if he chooses, however great may be the inconvenience to the public, it does not follow that he would be bound by a contract in which he stipulates never to employ her in the waters of the state. He might afterwards change his mind and desire to engage in commerce with her in the prohibited waters, and on the ground of public policy he would not be bound by his contract. And if the purchaser of a steamboat, at the time of the purchase, covenants with the seller that he will not run or employ, or suffer to run or be employed, the said boat even for ten years upon any of the routes of travel of the waters of a state, the covenant is in restraint of trade and commerce. Such a covenant applies not only to existing routes of travel, but to all new routes opened during the ten years.¹⁴ But a contract not to run boats on a certain line of travel is not void as being against public policy and in restraint of trade.¹⁵ And, it has been held, the covenantor is not released from his covenant by a sale of his interest in boats which are the subject of such an agreement.¹⁶

Effect of Illegality.

§ 105. Partial Illegality.—When the object of a contract is unlawful in part, the entire contract is void, un-

court declared, however, that the order of the commission was too broad, and set out in its opinion the respects in which the order should be modified.

See, also, note in 7 A. L. R., p. 449, for extensive discussion of the validity of contracts by which manufacturers attempt to control resale prices.

13. See *supra*, § 103.

14. *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186, per Crockett, J.

15. *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511.

16. *California Steam Nav. Co. v. Wright*, 8 Cal. 585.

less the lawful portion thereof is severable from that which is unlawful.¹⁷ The code provides that

“Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.”¹⁸

But it is both familiar and declared law that where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, the contract is void as to the latter and valid as to the rest.¹⁹ The valid portion of a demand may be enforced where separable from that part which is void.²⁰

Whether a contract is entire or severable depends upon its language and subject matter, and this question is one of construction to be determined according to the intention of the parties.¹ An agreement between a husband and wife settling their property rights is not void because of

17. *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560; *Mitchell v. Cline*, 84 Cal. 409, 24 Pac. 164; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *McGregor v. Donnelly*, 67 Cal. 149, 7 Pac. 422; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Granger v. Original Empire etc. Min. Co.*, 59 Cal. 678; *Prost v. More*, 40 Cal. 347; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770 (overruled on another point in *Reed v. Bernal*, 40 Cal. 628); *Jackson v. Shawl*, 29 Cal. 267.

18. Civ. Code, § 1598; *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242.

19. Civ. Code, § 1599; *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*, 60 Cal. Dec. 381, 192 Pac. 847; *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884; *McVicker v. McKenzie*, 136 Cal. 656, 69 Pac.

495; *Mack v. Jastro*, 126 Cal. 130, 58 Pac. 372 (citing *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580); *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841 (contract in restraint of trade); *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770 (overruled on another point in *Reed v. Bernal*, 40 Cal. 628); *Jackson v. Shawl*, 29 Cal. 267; *Hogue-Kellogg Co. v. Baker*, 32 Cal. App. Dec. 56, 190 Pac. 493; *Porter v. Fisher*, 4 Cal. Unrep. 324, 34 Pac. 700.

20. *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860; *Boyle v. Tibbey*, 82 Cal. 11, 22 Pac. 1128; *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124 (these cases involved street assessments).

1. *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*, 60 Cal. Dec. 381, 192 Pac. 847. See *infra*, § 191, as to entire and severable contracts generally.

the contemporaneous execution of another agreement, relating to the bringing of an action for divorce, disconnected and separable from the former one.² And although that portion of an agreement which provides for the payment of an attorney fee to the wife, in the event that either of the parties should ever institute an action for divorce, is void, if it relates to a different subject, and is entirely distinct and separable from other and valid provisions of the agreement, it will not affect their enforceability.³ So, too, a contract providing for the furnishing of telegraph franking privileges in consideration of the grant of a right of way, which became void as to interstate messages by the passage of the Interstate Commerce Act, is not also void as to intrastate messages, where the contract as to interstate and intrastate messages was clearly separable in fact and law.⁴ Contracts in restraint of trade are divisible, and when such an agreement contains a stipulation capable of being construed separately, one part of which is void because in restraint of trade, while the other is not, the latter will be given effect and enforced.⁵

§ 106. Enforceability Generally.—The general rule is that an illegal contract—a contract growing immediately out of or connected with an illegal act—is absolutely void, and cannot form the basis of judicial proceedings. This is equally so in law and equity. The illegality vitiates the contract between the immediate parties, as well as in respect to third parties.⁶ This rule applies to every contract

2. *Estate of Sloan*, 179 Cal. 393, 177 Pac. 150.

3. *McCahan v. McCahan*, 31 Cal. App. Dec. 1105, 1107, 190 Pac. 458, 460.

4. *Irvine v. Postal-Telegraph Cable Co.*, 37 Cal. App. 60, 173 Pac. 487.

5. See *supra*, § 95 et seq.

6. *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 601, 117

Pac. 767; *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708 (promissory note given for gambling debt); *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416 (contract in restraint of trade); *Dèmartini v. Anderson*, 127 Cal. 33, 59 Pac. 207 (lease of house to be used for im-

which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy.⁷ Neither the silence nor the consent of the parties justifies a court in retaining jurisdiction of an action based on such an agreement.⁸ Nor in such cases does it matter whether the contract has been partially or wholly performed, or

moral purposes with knowledge and consent of owner); *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777 (illegal contract by member of city council); *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015 (partnership formed to carry on business of letting furnished apartments for purpose of prostitution); *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510 (illegal contract by city with bank by which latter was to receive public moneys on deposit); *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581 (contract in restraint of trade); *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735 (agreement to procure title to state lands in contravention to land laws); *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36 (contract tending to create monopoly); *Jones v. Hanna*, 81 Cal. 507, 22 Pac. 883 (illegal contract by executrix); *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391 (contract executed for purpose of increasing price of lumber and limiting supply); *San Diego Water Co. v. City of San Diego*, 59 Cal. 517 (contract made in violation of law by the officers of a municipal corporation); *Swanger v. Mayberry*, 59 Cal. 91

(note given for the privilege of cutting down timber growing upon the public lands of the United States); *Ladda v. Hawley*, 57 Cal. 51 (contract relating to illegal cutting of timber on public lands); *Hill v. Kidd*, 43 Cal. 615 (contract of wages); *Jackson v. Shawl*, 29 Cal. 267; *Sloss v. Holland*, 38 Cal. App. 318, 176 Pac. 72 (contract for promotion of lottery scheme); *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25 (illegal lease). See, also, *ACTIONS*, vol. 1, p. 333.

7. *Eymann v. Wright*, 177 Cal. 144, 169 Pac. 1037; *Colby v. Title Ins. etc. Co.*, 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015 (letting of premises for purposes of prostitution); *Buck v. City of Eureka*, 109 Cal. 504, 30 L. R. A. 409, 42 Pac. 243 (contract increasing compensation of public officer); *Estate of Groome*, 94 Cal. 69, 29 Pac. 487; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25; *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94, 89 Pac. 866.

8. *Dealey v. East San Mateo Land Co.*, 21 Cal. App. 39, 130 Pac. 1066. See, also, *ACTIONS*, vol. 1, p. 334.

whether the consideration has passed or not.⁹ And the defect of illegality is not cured by the parties subsequently being in condition to contract.¹⁰

The doctrine of estoppel by conduct or by laches or even that of ratification has no application to a contract void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no legal standing whatever. It has no entity for any purpose, and neither action nor inaction of a party can validate it, and no conduct of a party can be invoked as an estoppel against asserting its invalidity.¹¹ The illegality may be in the consideration or in the promises and stipulations of the agreement.¹²

Exceptions to the rule of nonenforceability of illegal contracts arise in cases where the parties are not in *pari delicto*, or where one of them is the victim of duress or fraud, or superior influence.¹³

Attitude of courts.—Generally, when an illegal contract is relied on, regardless of the form of the action in which it is presented, a court will disregard it,¹⁴ and leave the parties precisely where it finds them.¹⁵ When parties

9. *Berka v. Woodward*, 125 Cal. 119; 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Visalia Gas & E. L. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

10. *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022; *Ladda v. Hawley*, 57 Cal. 51. See, also, *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880 (holding that a certificate applied and paid for by a physician, before a contract for his services is entered into, will not, when granted, relate to the date of the application and payment, so as to entitle him to recover for services rendered before the certificate is actually procured).

11. *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, Ann. Cas. 1913A,

515, 35 L. R. A. (N. S.) 813, 117 Pac. 913.

12. *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391. See *infra*, §§ 129, 130, as to illegality of consideration.

13. *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510. See *infra*, § 109.

14. *Buck v. City of Eureka*, 109 Cal. 504, 30 L. R. A. 409, 42 Pac. 243; *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801; *Santa Clara Valley etc. Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Johnson v. Davidson*, 36 Cal. App. Dec. 166.

15. *Glenn v. Rice*, 174 Cal. 269, 162 Pac. 1020; *Bulson v. Moffatt*,

make such contracts they must rely for performance upon the good faith of those with whom they deal, and that failing, they are denied all redress.¹⁶ It is, therefore, settled that the failure of a party against whom relief is sought to make objection upon the ground of illegality, or the waiver of such objection by him, or even his express consent that the court may enforce the illegal contract, will not justify an enforcement of the same. The illegality appearing, the court will, *sua sponte*, withhold all relief.¹⁷

§ 107. Basis of Rule.—The rule as to the nonenforceability of illegal contracts is not based upon any consideration for the party against whom the relief is sought, and who may be benefited by the refusal of the court to grant the same, but upon considerations of sound public policy.¹⁸ It is not for the sake of a party, but for the

173 Cal. 685, 161 Pac. 259; *Gugolz v. Gehrken*, 164 Cal. 596, 43 L. R. A. (N. S.) 575, 130 Pac. 8; *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *Ballerino v. Ballerino*, 147 Cal. 544, 82 Pac. 199; *Napa Valley Electric Co. v. Calistoga Electric Co.*, 38 Cal. App. 477, 176 Pac. 699; *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25; *Butler v. Agnew*, 9 Cal. App. 327, 99 Pac. 395.

"No court will lend itself to the enforcement of a contract the right to which enforcement rests upon a violation of the laws for whose support the court has taken its oath." *Wood v. Wood's Estate*, 137 Cal. 148, 69 Pac. 981.

16. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510; *Jones v. Hanna*, 81

Cal. 507, 22 Pac. 883; *Hill v. Kidd*, 43 Cal. 615.

17. *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*, 60 Cal. Dec. 381, 192 Pac. 847; *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207; *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015; *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801; *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25.

18. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *Napa Valley Electric Co. v. Calistoga Electric Co.*, 38 Cal. App. 477, 176 Pac.

sake of the law itself, that a court refuses to allow the law to be made use of, for the enforcement of illegal contracts, and leaves the parties where it finds them.¹⁹ In other words, a contract tainted with illegality creates no obligation, not because of the rights of the parties, but because the public is interested.²⁰ And, while as a matter of private justice it would seem fair that one under an illegal contract should restore the consideration or should make the payment, the rights of the public are superior, and such right is that "the fountains of justice shall remain unpolluted"—that no court shall lend its aid to one who grounds his action upon an immoral or illegal act. Therefore, there is no place for equitable considerations, presumptions or estoppels.¹

The rule, being founded on public policy, should be rigidly enforced.² Attempts may be found occasionally, it has been said, to evade the application of the settled doctrine upon the ground of the hardship which sometimes results, "but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding

699; *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571; *Butler v. Agnew*, 9 Cal. App. 327, 99 Pac. 395.

19. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571; *Butler v. Agnew*, 9 Cal. App. 327, 99 Pac. 395.

20. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015; *Santa Clara Valley Mill &*

Lumber Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Sloss v. Holland*, 38 Cal. App. 318, 176 Pac. 72; *Valentine v. Stewart*, 15 Cal. 387.

1. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *King v. Johnson*, 30 Cal. App. 63, 157 Pac. 531.

2. *Jones v. Hanna*, 81 Cal. 507, 22 Pac. 883 (*Thornton, J.*, dissenting, holds that the rule does not extend to cases where the contract appears to be lawful in itself, and founded upon a consideration which is only collaterally connected with a prohibited sale of property, by an executor, or administrator which is only voidable and not absolutely void).

public necessity been questioned.”³ In case of fraud or mistake, the wrong is usually personal to the injured party, and may be waived. In cases of illegality, the wrong is far-reaching,—it is done to society.⁴

§ 108. Parties in Pari Delicto.—While an illegal contract remains executory, relief should be awarded to one who repudiates it because of its illegality;⁵ yet where there has been no withdrawal, nor attempt to withdraw from the transaction until after it has become executed, the law accords no *locus poenitentiae*.⁶ But the general rule that where an illegal contract has been fully executed on both sides the law will aid neither party to recover anything parted with thereunder is subject to the qualification, among others, that the parties are in *pari delicto*.⁷ It will be seen, upon examination of the cases supporting the rule, that they proceed upon the theory that the parties were equally in fault and that each had freely joined in the transaction without being induced thereto by the oppression or fraud of the other.⁸ Except when public policy requires that relief should be given,⁹ or when relief is granted by express provision of law,¹⁰ the courts

3. *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777, per Henshaw, J.

4. *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391.

5. *Wassermann v. Sloss*, 117 Cal. 425, 49 Pac. 566; *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571.

6. *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571; *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913; *Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395; *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L. R. A. 750, 45 Pac. 1015; *Ager v. Duncan*, 50 Cal. 326.

7. *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398.

8. *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913 (one induced to sign deeds through duress may maintain suit in equity for cancellation); *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398.

9. *El Dorado County v. Davison*, 30 Cal. 520.

10. *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927 (decided under section 26 of article IV of the constitution, which prior to its amendment, November 3, 1908, permitted a recovery of money paid on margin contracts,

almost invariably apply the maxim "in pari delicto potior est conditio defendentis"—the parties being in *pari delicto* the court will leave them where it finds them.¹¹ When the plaintiff asserts his own turpitude, he sends his case out of court. "If, in attempting, by way of reprisal or otherwise, to swindle another, he becomes the victim of his own arts, it may become a question in morals or in honor, which party is the more culpable; courts of law entertain no discussion on the subject, but terminate the controversy by shutting their doors in the face of the intruder."¹²

Parties to an illegal contract in restraint of trade are in *pari delicto* and cannot recover against each other.¹³ In the absence of any evidence tending to show the exercise of undue influence by one party over the other, or that the latter was ignorant of the law, the mere fact that the former was in *loco parentis* to him, and that he had barely attained his majority, does not prevent them from being in *pari delicto* in respect to an illegal contract.¹⁴

The rule that where parties are in *pari delicto* the court leaves them as it finds them does not apply where the contract was a legal, just and equitable one when made, but which has become unlawful in part by subsequent legislation. To deny recovery for property conveyed

they being illegal under the same section); *Baldwin v. Zadig*, 104 Cal. 594, 38 Pac. 363, 722.

11. *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *McGregor v. Donnelly*, 67 Cal. 149, 7 Pac. 422; *Taylor v. Hammel*, 39 Cal. App. 205, 178 Pac. 547; *Dunn v. Stegeman*, 10 Cal. App. 38, 101 Pac. 25 (no action for rent can be maintained upon lease knowingly executed by both parties for saloon purposes within one hundred and fifty feet of church, in express violation of city ordinance).

12. *Abbe v. Marr*, 14 Cal. 210,

per *Baldwin, J.*; *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571.

13. *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 601, 117 Pac. 767 (holding in action by raisin growers' association for accounting with members contracting to sell raisins, defense that it was formed for illegal purpose in restraint of trade was inapplicable); *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416.

14. *Gugolz v. Gehrkins*, 164 Cal. 596, 43 L. R. A. (N. S.) 577, 130 Pac. 8.

under a contract legal when made, and legal when the property was conveyed, but which by reason of a change in public policy has become unlawful, would, it has been said, be to take property without due process of law.¹⁵

§ 109. Parties not in *Pari Delicto*.—As indicated above, the rule that a party to a fraudulent and illegal transaction is not entitled to any relief applies only when the parties are in *pari delicto*.¹⁶ The parties are not in *pari delicto* when the offense of one party is trivial in comparison with that of the other, who is not only guilty of a fraud common to the two, but of a more heinous fraud, in which he alone participates.¹⁷ Thus a party is entitled to relief when he is ignorant of the unlawful purpose of a contract or series of contracts, fair on

15. *Irvine v. Postal Telegraph-Cable Co.*, 37 Cal. App. 60, 173 Pac. 487.

16. *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398; *McColgan v. Muirland*, 2 Cal. App. 6, 82 Pac. 1113. The exceptions to the rule, based on the theory that the parties are not in *pari delicto*, have been stated by a well-known writer in the following language: "Such an inequality of condition exists so that relief may be given to the more innocent party, in two distinct classes of cases: 1. It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, if considered by themselves alone, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats,

undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it had been voluntarily entered into. 2. The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is intrinsically unequal; is of such a nature that one party is necessarily innocent as compared with the other; the stipulations, undertakings and position of one are essentially less illegal and blameworthy than those of the others." *Pomeroy's Equity Jurisprudence*, 3d ed., § 942. This classification is commented upon with approval in *Gugolz v. Gehrkens*, 164 Cal. 596, 43 L. R. A. (N. S.) 577, 130 Pac. 8. See, also, *Bank of Orland v. Harlan*, 35 Cal. App. Dec. 563 (quoting from *Pomeroy's Equity Jurisprudence*, § 942).

17. *Donnelly v. Rees*, 141 Cal. 56, 74 Pac. 433.

the face and importing legal rights and obligations in his favor.¹⁸ Likewise where the party seeking relief was not a free, moral agent, and his consent was obtained through duress, menace or undue influence, he is not regarded as in *pari delicto* with the person obtaining his consent, and will not be precluded from invoking affirmative relief in equity to set aside the contract or to defeat an attempted enforcement against him.¹⁹ Where there is oppression on one side and submission on the other, there can be no equal fault.²⁰ One who is induced through duress, menace and undue influence to execute conveyances, the consideration for which is the compounding of a felony, may maintain a suit in equity for their cancellation.¹ The stifling of a criminal prosecution against an innocent man, by the payment of money, is not wrong in an equal degree to the threatened prosecution itself.²

By the weight of authority, where money or other property has been deposited in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and may reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not in *pari delicto*, though to some extent involved in the illegality, but who is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require.³ The

18. *Taylor v. Hammel*, 39 Cal. App. 205, 178 Pac. 547 (holding that in order to avoid such contracts, plaintiffs must rescind in the manner prescribed by law).

19. *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913; *Donnelly v. Rees*, 141 Cal. 56, 74 Pac. 433 (deed to defraud creditors). As to freedom of consent, see *supra*, § 22 et seq.

20. *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398.

1. *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 70 et seq.

2. *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398. See COMPOUNDING CRIMES, vol. 5, p. 379.

3. *Wassermann v. Sloss*, 117 Cal. 425, 59 Am. St. Rep. 209, 38 L. R. A. 176, 49 Pac. 566; *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510; *Savings Bank of San Diego v. Burns*, 104 Cal. 473, 38

defense of want of notice of illegality is available only where the contract is a negotiable instrument in the hands of one who has acquired it for value before maturity and in the ordinary course of business.⁴ When a contract is not shown to be of an illegal character, the question whether the parties are in *pari delicto* is not, of course, pertinent to the case.⁵

§ 110. Enforceability of Promise Growing Out of Illegal Contract.—A principle of the common law is that a contract executed in consideration of a previous illegal one, or in compromise of differences growing out of it, is like that whereon it rests, illegal and incapable of being enforced.⁶ No action of the parties or their assignees can so validate an illegal contract as to justify a court in enforcing it where its illegality appears. An attempted compromise of a claim based on such a contract, whether before or after institution of action thereon, has been characterized simply as an act of the parties looking to ratification, and can in no way affect the power of the court to refuse to allow itself to be used as the instrument for its enforcement. Merely repeating a promise based on an illegal consideration cannot give it validity.⁷ An agreement not to prevent the illegal laying of a railway track in a street is void and against public policy, and, hence, is not a valid consideration for another promise.⁸ It has been held, however, that the taint of invalidity of an illegal promise to pay another for his trouble in bid-

Pac. 102; *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14. And see *supra*, § 108.

4. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708.

5. Civ. Code, § 1689, subd. 2; *McDonald v. Pacific Debenture Co.*, 146 Cal. 667, 80 Pac. 1090.

6. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep.

164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *Bryant v. Mead*, 1 Cal. 441.

7. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708, per Angellotti, J.

8. *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 30 Pac. 550.

ding in property for the benefit of an assignee in insolvency who made the sale did not attach to an agreement by the assignee that, after receiving his deed, he would employ the bidder as manager at a specified salary; and that such latter agreement, carried out by subsequent employment, was to be deemed a valid severable provision of the contract, to pay at the agreed rate for the services rendered.⁹

§ 111. Enforceability of Independent Cause of Action.—

Even though parties have been engaged in an illegal transaction, yet if the cause of action between them is disconnected from the illegal act and is founded upon a distinct and collateral consideration, and the plaintiff is not obliged to resort to the illegal contract in order to maintain the suit, the illegality of the former transaction will not impair or bar the right to maintain the suit. If the contract does not depend upon or require the enforcement of the unexecuted provisions of the illegal contract, it will be carried out. Therefore the test is declared to be whether the contract sought to be enforced can be separated from the illegal acts or contracts relied upon as avoiding it, and whether the plaintiff requires any aid from, or must in any way rely upon the illegal transaction in order to establish his case.¹⁰

When an action is not to enforce an illegal contract, but is to establish title to property acquired under it, the action may be maintained. The difference between the enforcement of an illegal contract and a suit to recover property acquired with funds derived through such a contract, it has been declared, has always been recognized by

9. *McVicker v. McKenzie*, 136 Cal. 656, 69 Pac. 495.

10. *Howell v. City of Hamburg Co.*, 165 Cal. 172, 131 Pac. 130; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Moore v. Moore*, 130 Cal. 110, 80 Am. St. Rep. 78, 62

Pac. 294; *Wayman Inv. Co. v. Wesinger*, 13 Cal. App. 108, 108 Pac. 1022; *Butler v. Agnew*, 9 Cal. App. 327, 99 Pac. 395 (holding claim of plaintiff could be established only by introduction in evidence of entire illegal contract).

the courts. After an illegal contract has been executed one party in possession of all the gains resulting from the illicit transactions will not be permitted to interpose the objection that the business which produced the fund was one conducted in violation of law. Certainly when the profits of an illegal transaction have been actually divided or invested in other property, the illegality of the other transaction in no way affects the title to such property or subsequent dealings in regard to it.¹¹

It has been held that a lease of a building constructed in violation of a fire ordinance, which does not in terms prohibit the lease, is not founded upon an illegal consideration, and if it is not made for any illegal purpose, an action for rent may be based upon such lease in favor of the owner of the building as lessor.¹² But a contract between a father, who was entitled to make a homestead entry, and

11. *Johnson v. Davidson*, 36 Cal. App. Dec. 186, 202 Pac. 159, per Kerrigan, J. (citing *Cal. Cured Fruit Assn. v. Stelling*, 141 Cal. 714; *Wayman Inv. Co. v. Wessinger*, 13 Cal. App. 108). It is to be noted, however, that in its opinion denying a hearing of this case (reported 62 Cal. Dec. 568, 202 Pac. 159) the supreme court in bank, while not denying that the rule is as stated above in the text, nevertheless declared that the record did not show that any illegal contract was involved, and hence, that the discussion by the district court of appeal of the effect of the supposed illegal contract should be disregarded.

And see *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581, wherein *McFarland, J.*, says: "Courts have held, in a few instances, against the current of authority, that where money or other property has accumulated under an illegal contract, equity

will not refuse to dispose of such property as between the parties."

12. *Wayman Inv. Co. v. Wessinger*, 13 Cal. App. 108, 108 Pac. 1022. This case was distinguished in *Howell v. City of Hamburg Co.*, 165 Cal. 172, 131 Pac. 130, in which a lease calling for the construction of an unlawful building was held void as being based upon an illegal consideration, the court saying: "Our conclusion in this case is not in conflict with the case of *Wayman Investment Co. v. Wessinger et al.*, 13 Cal. App. 108, 108 Pac. 1022. There the contract of lease did not require the erection of a building in violation of an ordinance, but the lease was of a building which had already been constructed, and what was said by the court in that case was that 'the leasing and giving possession of a building originally illegally constructed, for an agreed rental,' involved no violation of law; that 'the ordinance did not in terms pro-

his son, who, without the father's original knowledge or consent, had by fraud and perjury made an entry in his own name, that the son should thereafter proceed and make proofs, and obtain title from the government for the father's benefit, and then convey the same to the father, being illegal and void, an action by the father to enforce a trust in the title so acquired by the son, necessarily depending upon the enforcement of the illegal contract, cannot be maintained.¹³

§ 112. Pleading Illegality.—Where the defendant does not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiff or the defendant, it becomes the duty of the court sua sponte to refuse to entertain the action.¹⁴ And where facts showing illegality are sufficiently alleged in the answer, the plaintiff cannot recover upon the pleadings, although such facts are not pleaded or insisted upon as a defense.¹⁵ But the contention of the defendant that the agreement was illegal will not be considered on his appeal from the judgment if the record does not disclose the illegality.¹⁶ Where the complaint discloses the illegal transaction upon which plaintiff founds his right to recover, no evidence is admissible in support of the alleged cause of action.¹⁷ If the facts averred do not state an unlawful contract, its unlawfulness, if any, is a matter of defense.¹⁸

hibit the leasing of such a building.' Moreover, in that case it appeared that the tenants were in possession, enjoying the use of the illegal structure, and apparently claimed the right to do so without the payment of any rent."

13. *Moore v. Moore*, 130 Cal. 110, 80 Am. St. Rep. 8, 62 Pac. 294.

14. *De Leonis v. Walsh*, 140 Cal.

175, 73 Pac. 813; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735. And see cases cited supra, § 106.

15. *Prost v. More*, 40 Cal. 347.

16. *Lillie v. Andrews*, 24 Cal. App. 10, 139 Pac. 1081.

17. *King v. Johnson*, 30 Cal. App. 63, 157 Pac. 531.

18. *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 557.

V. CONSIDERATION.

In General—Sufficiency and Adequacy.

§ 113. **Definition and Nature.**—Consideration, as the term is employed in legal phraseology, is generally understood to be the equivalent or return given or detriment suffered by one for the act or promise of another.¹⁹ Hence, an article which is without value cannot afford any consideration for a promise, and an agreement supported solely by such an article is nudum pactum, absolutely void ab initio, for want of consideration.²⁰ Thus, the giving of an extension of time within which to pay a void note constitutes no consideration for a renewed promise to pay same.¹ And a disclaimer by one having no title to the property in question can furnish no consideration for a promise.² Neither is the release of a purported claim against one upon whom there rests no legal or moral obligation to pay the same a sufficient consideration for a third party's promise to pay such nonenforceable claim, unless it be upon the compromise of a doubtful or disputed claim.³ Mere motive or inducement or hope of profit is not consideration. If a motive alone were equivalent to a consideration, every promise made free from fraud, duress and the like, would necessarily be enforceable without any consideration.⁴

Wherever the acceptance of an offer imposes an obligation on the acceptor, a consideration is present and a binding contract results.⁵ In the case of unilateral con-

19. *Pacific Improvement Co. v. Maxwell*, 26 Cal. App. 265, 146 Pac. 900.

20. *Gifford v. Carvill*, 29 Cal. 589.

1. *Pacific Rys. Advertising Co. v. Carr*, 29 Cal. App. 722, 157 Pac. 529.

2. *Schwartz v. Bohle*, 32 Cal. App. Dec. 197, 190 Pac. 819.

3. *Pacific Rys. Advertising Co. v.*

Carr, 29 Cal. App. 722, 157 Pac. 529. See *infra*, § 116 et seq., as to sufficiency of consideration; § 120 as to compromise of doubtful claim as a sufficient consideration.

4. *Williams v. Hasshagen*, 166 Cal. 386, 137 Pac. 9 (quoting *Page on Contracts*).

5. *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 117 Pac. 934.

tracts, the doing of the thing specified constitutes the consideration which makes the promise binding. Thus, if A promises B to pay him a sum of money, if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time the obligation of the contract or promise is suspended; for, until the performance of the condition of the promise there is no consideration, and the promise is nudum pactum; but on the performance of the condition of the promise, it is clothed with a valid consideration, which relates back to the promise, and it then becomes obligatory.⁶ This is so even though the performance of the act could not be enforced.⁷ The validating power of a consideration extends to all the parts of an entire contract.⁸ But the mere presence of a consideration will not form a sufficient foundation for a recovery in the absence of the other elements necessary to the validity of a contract. Thus it was held that the fact that there was a consideration which would prevent the contract of a corporation from being nudum pactum for the want of it, did not make a case of benefits to be paid for, where the contract was ultra vires.⁹ Nor will the mere repetition of a promise unsupported by consideration lend it validity. A note given in renewal for one void for want of consideration is, like the first, invalid and unenforceable.¹⁰

§ 114. Kinds.—At common law there was a settled definition for each of the different kinds of consideration.

6. *Royer v. Kelly*, 174 Cal. 70, 161 Pac. 1148; *State Loan etc. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600 (agreement to waive statute of limitation); *Jones v. Snow*, 64 Cal. 456, 2 Pac. 28; *Mathewson v. Fitch*, 22 Cal. 86.

7. *Pacific Coast Casualty Co. v. Davis*, 38 Cal. App. 152, 175 Pac. 701.

8. *Daniels v. Daniels*, 3 Cal. App. 294, 85 Pac. 134. See *infra*, § 126.

9. *Visalia G. and E. L. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042. See CORPORATIONS.

10. *Pacific Rys. Advertising Co. v. Carr*, 29 Cal. App. 722, 157 Pac. 529.

A good consideration was such as that of blood, or of natural affection. A valuable consideration was such as money or the like.¹¹ That of the former kind was somewhat limited in its effectiveness. Deeds made upon good consideration were considered as merely voluntary and were frequently set aside in favor of creditors and bona fide purchasers.¹² A valuable consideration was sufficient, however, even though it might be greatly disproportionate to the value of the land, or other subject matter of the contract.¹³ Consideration is defined by Civil Code, section 1605, as follows:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."¹⁴

The term "good consideration" employed in this section is not used in the ancient technical sense, as that of blood or natural affection, but as equivalent to the term "valuable consideration."¹⁵ Accepting the common-law definition, it is "such as money or the like."¹⁶ But as the

11. *Frey v. Clifford*, 44 Cal. 335; *Clark v. Troy*, 20 Cal. 219.

12. *Clark v. Troy*, 20 Cal. 219. See DEEDS.

13. *Frey v. Clifford*, 44 Cal. 335.

14. *Western Lithograph Co. v. Vanomar Producers*, 61 Cal. Dec. 425, 197 Pac. 103; *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027; *Knock v. Haizlip*, 163 Cal. 146, 124 Pac. 998; *Hamilton v. Klinke*, 42 Cal. App. 426, 183 Pac. 675 (holding that contract showed consideration for promise was "good consideration"); *Jordan v. Scott*, 38 Cal. App. 739, 177 Pac. 504; *Pacific Coast Casualty Co. v. Davis*, 38 Cal.

App. 152, 175 Pac. 701; *Held v. Beach-Robinson Co.*, 32 Cal. App. 93, 162 Pac. 661 (holding that the existence of the obligations assumed in the acceptance of orders on a building contractor constitutes a sufficient consideration under section 1606 of the Civil Code for the written promise of the contractor made a few days after such acceptance to pay the amounts thereof); *Schaadt v. Mutual Life Ins. Co.*, 2 Cal. App. 715, 84 Pac. 249.

15. *Aden v. City of Vallejo*, 139 Cal. 165, 72 Pac. 905.

16. *Aden v. City of Vallejo*, 139 Cal. 165, 72 Pac. 905; *Denehy v.*

real consideration may not be financial at all,¹⁷ it may be stated in more general terms that it must be either such as deprived the person to whom the promise was made of a right which he before possessed, or else conferred upon the other party a benefit which he could not otherwise have had.¹⁸ A consideration may be executed or executory, in whole or in part. In so far as it is executory it is subject to the provisions of the code relative to legality.¹⁹

§ 115. Necessity.—The final element denoted by section 1550 of the Civil Code as essential to the existence of a contract is “a sufficient cause or consideration.” A promise which is unsupported by consideration has no binding force and effect, and is not enforceable at law.²⁰

Stewart, 41 Cal. App. 88, 181 Pac. 839; Lindley v. Blumberg, 7 Cal. App. 140, 93 Pac. 894.

17. Estate of Colton, 164 Cal. 1, 127 Pac. 643.

18. Jordan v. Scott, 38 Cal. App. 739, 177 Pac. 504.

19. Civ. Code, § 1609; La Grill v. Mallard, 90 Cal. 373, 27 Pac. 294; Mission Brewing Co. v. Rickert, 39 Cal. App. 668, 179 Pac. 720. See supra, §§ 58-112.

20. Western Lithograph Co. v. Vanomar Producers, 61 Cal. Dec. 425, 197 Pac. 103 (agreement to pay increase over price at which defendant was legally bound to deliver goods); Lundeen v. Ottis, 164 Cal. 183, 128 Pac. 335; Stroud v. Thomas, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008 (but holding contract of surety was supported by consideration); Peachy v. Witter, 131 Cal. 316, 63 Pac. 468 (extension of time of payment); Wright v. Byrne, 129 Cal. 614, 62 Pac. 176 (note); Commercial Bank of Nevada v. Redfield, 122 Cal. 405, 55 Pac. 160, 772 (verbal promise by

grantee to pay mortgage debt); Alaska Improvement Co. v. Hirsch, 119 Cal. 249, 47 Pac. 124, 51 Pac. 340 (injunction bond); Wheat v. Bank of California, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47 (promise of bank to intervener to hold fund sought to be recovered by receiver until litigation was fully determined); Heim v. Butin, 109 Cal. 500, 50 Am. St. Rep. 54, 42 Pac. 138 (decision of department in same case, reported, 5 Cal. Unrep. 19, 40 Pac. 39, not sustained); Connolly v. Hingley, 82 Cal. 642, 23 Pac. 273 (extension of time for payment); Ward v. Ward, 59 Cal. 138 (assignment); Waterloo Turnpike Road Co. v. Cole, 51 Cal. 381 (promise to pay tolls); Wheelock v. Pacific Pneumatic Gas Co., 51 Cal. 223 (waiver of claim for damages); Ager v. Duncan, 50 Cal. 325 (illegal contract); McKenty v. Gladwin, Hugg & Co., 10 Cal. 227 (antedated note); McCann v. Lewis, 9 Cal. 246 (extension of time for payment); Adams v. Hastings, 6 Cal. 126, 65 Am. Dec. 496 (additional interest); Fisher v. Sal-

In the absence of any sufficient consideration, the law supplies no means and affords no remedy to compel the performance of a contract.¹ This principle applies to all contracts regardless of form or origin. A statutory undertaking beyond what is required by the statute is to that extent without consideration and inoperative.² But if a transaction is a voluntary transfer, no consideration is necessary for its validity after execution.³ A voluntary settlement in trust for the benefit of the settler's children, if fully executed, does not require other consideration for its support than parental affection and duty.⁴

§ 116. Sufficiency in General.—The sufficiency of a purported or claimed consideration for a contract must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments,⁵ and is always a question of fact.⁶ Its efficacy is not affected by its being oral.⁷ Thus it has been held that a deed in consideration of an oral promise to pay

mon, 1 Cal. 413, 54 Am. Dec. 297 (guaranty); *Roth v. Moeller*, 61 Cal. Dec. 444, 197 Pac. 62 (agreement, unsupported by consideration, not to revoke bare offer); *Martin v. McCabe*, 21 Cal. App. 658, 132 Pac. 606 (bond given under unconstitutional statute); *Dean v. Sedan Milling Co.*, 19 Cal. App. 28, 124 Pac. 736 (holding promise of forbearance not supported by consideration did not discharge guarantor); *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 117 Pac. 934; *Heinrich v. Heinrich*, 2 Cal. App. 479, 84 Pac. 326 (settlement procured by husband from wife by fraud); *Thomson-Houston Electric Co. v. Central Ry. Co.*, 6 Cal. Unrep. 202, 55 Pac. 777. See *supra*, § 28, as to effect of consideration upon enforceability of option agreement.

1. *Gordon v. Green*, 34 Cal. App. Dec. 791, 197 Pac. 955.

2. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Powers v. Crane*, 67 Cal. 65, 7 Pac. 135; *People v. Cabannes*, 20 Cal. 528. As to statutory and common-law bonds, see *BONDS*, vol. 4, p. 354.

3. Civ. Code, § 1040; *National Bank v. Exchange Bank*, 61 Cal. Dec. 771, 199 Pac. 1; *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471. See *ASSIGNMENTS*, vol. 3, p. 268; *GIFTS*.

4. *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089.

5. *Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109, 1111.

6. *Estate of Thomson*, 165 Cal. 290, 131 Pac. 1045.

7. *Norris v. Lilly*, 147 Cal. 754, 109 Am. St. Rep. 188, 82 Pac. 425.

the debts of the grantor, and to provide for his support, is founded upon a consideration, and cannot be avoided and canceled merely because the contract is not susceptible of specific performance.⁸ In a case where the question of the sufficiency of the consideration for the contract rests wholly upon the construction of the evidence, which is conflicting, a verdict for the plaintiff will not be disturbed on appeal.⁹ The assignment of a right is a valuable consideration to support a promise to pay its reasonable value, where the assignee obtains the benefit of such right.¹⁰ And a deed reciting a consideration of love and affection, better support and maintenance, one dollar, and other good and valuable considerations, cannot be held to be a conveyance without a valuable consideration, in the absence of any evidence contradicting the express declarations of the instrument.¹¹ Uncertainty as to the location of a common boundary between adjoining owners is a sufficient foundation for their agreement upon certain lines as, and for, such boundary.¹² Marriage, it has been declared, is the highest and most valuable of considerations.¹³ Where a stipulation is filed in an action and the parties act in pursuance of its provisions for a considerable time thereafter, it cannot be said to be without consideration as a stipulation controlling the proceeding in the action.¹⁴

§ 117. Benefit to Promisor or Detriment to Promisee.—

In a final analysis, consideration resolves itself into a ben-

8. *Norris v. Lilly*, 147 Cal. 754, 109 Am. St. Rep. 188, 82 Pac. 425; *Grimmer v. Carleton*, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043. See SPECIFIC PERFORMANCE.

9. *McC Campbell v. Obear*, 27 Cal. App. 97, 148 Pac. 942; *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677.

10. *McCarthy v. Pope*, 52 Cal. 561.

11. *Franck v. Moran*, 36 Cal. App. 32, 171 Pac. 841. See DEEDS.

12. *Thaxter v. Inglis*, 121 Cal. 593, 54 Pac. 86. See BOUNDARIES, vol. 4, p. 427 et seq.

13. *Cohen v. Knox*, 90 Cal. 266, 13 L. R. A. 711, 27 Pac. 215. See MARRIAGE.

14. *Scheeline v. Moshier*, 172 Cal. 565, 158 Pac. 222. See STIPULATIONS.

efit to the promisor, or a detriment to the promisee.¹⁵ Some advantage to promisor, or injury to promisee—the degree not material—should occur.¹⁶ Accordingly, any benefit received by the maker of a promise to which he is not lawfully entitled is a sufficient consideration for its execution.¹⁷ The benefit may be trifling, but if the promisor is not otherwise lawfully entitled to it, it is sufficient to sustain the contract, as a matter of law.¹⁸ The law does not weigh the quantum of the consideration.¹⁹ Information of an outstanding title to land, in the adverse possession of another, constitutes a good consideration for a promissory note, and the sale of such information is not barratrous.²⁰ So also it will constitute a valuable consideration sufficient to support a contract for the purchase of real estate if the grantee becomes surety on a note of the grantor, whether the grantee pays the amount of the note or not.¹ An agreement by a party to

15. Civ. Code, § 1550; *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 557; *Visalia G. & E. L. Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042; *Gifford v. Carvill*, 29 Cal. 589; *Parson v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109, 1111; *National Bank v. Whitney*, 40 Cal. App. 276, 180 Pac. 845; *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484; *Lyon v. Robertson*, 6 Cal. Unrep. 390, 59 Pac. 990;

16. *Heim v. Butin*, 109 Cal. 500, 50 Am. St. Rep. 54, 42 Pac. 138; *Jordan v. Scott*, 38 Cal. App. 739, 177 Pac. 504; *Comstock v. Breed*, 12 Cal. 286.

17. Civ. Code, § 1605; *Stein v. Leeman*, 161 Cal. 502, 119 Pac. 663; *Western National Bank v. Wittman*, 31 Cal. App. 615, 161 Pac. 137.

See 2 Street's Foundations of Legal Liability, page 68, where the author contends strongly for the principle that mere benefit to the

promisor is not sufficient consideration to support a promise, saying: "The element alone which gives efficacy to the assumptual promise, is detriment to the promisee." However, section 1605 of the Civil Code settles the question in California.

18. *Stein v. Leeman*, 161 Cal. 502, 119 Pac. 663; *Smith v. Bangham*, 156 Cal. 359, 28 L. R. A. (N. S.) 522, 104 Pac. 689. See *infra*, § 128, as to adequacy of amount of consideration.

19. *Whelan v. Swain*, 132 Cal. 389, 64 Pac. 560; *Fairchild v. Cartwright*, 39 Cal. App. 118, 178 Pac. 333; *Randisi v. Simone*, 26 Cal. App. 661, 147 Pac. 1176; *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677. As to adequacy of amount, see *infra*, § 128.

20. *Lucas v. Pico*, 55 Cal. 126.

1. *Grigsby v. Shwarz*, 82 Cal. 278, 2 Pac. 1041.

a contract for the sale of land, that he will prevent a judgment against the other party in an action brought against him on a guaranty, or protect him against such judgment in case of a recovery, is a sufficient consideration for the contract of sale, although the contract may have been invalid.² It has been held by numerous authorities that a note or bond, executed by the directors of a bank to make good an impairment of the bank's assets, so that the bank may continue in business, is based upon a valid consideration.³

"Prejudice suffered."—An agreement to do any act or series of acts which the promisee, but for his agreement, was under no obligation to perform, has always been deemed an ample consideration for any contract, transfer or conveyance, whether the doing of such act or acts could be specifically enforced or not.⁴ Services to be rendered by a promisee in securing a loan for the promisor form a sufficient consideration to support a promise to pay a commission if the loan is obtained.⁵ The paying by a corporation of half the expense of procuring patents is a "prejudice suffered," within the meaning of section 1605 of the Civil Code, and is a sufficient consideration for a contract by which the inventor agrees to give a one-half interest in the patents to be procured to the corporation for paying part of the expenses of procuring them.⁶ Also the construction of a building in accordance with an agreement, in such manner as to render valueless one foot of the owners' ground, is a detriment which they are not "lawfully bound to suffer," and constitutes an ample consideration for any promise based thereon.⁷

2. Mound City Land & Water Assn. v. Slauson, 65 Cal. 425, 4 Pac. 396.

3. Stern v. McDonald, 31 Cal. App. Dec. 1033, 190 Pac. 221 (citing authorities from other jurisdictions).

4. Norris v. Lilly, 147 Cal. 754, 109 Am. St. Rep. 188, 8 Pac. 425.

5. Barley v. Buell, 70 Cal. 335, 9 Pac. 459, 11 Pac. 632.

6. Golden State etc. Works v. Angell, 89 Cal. 643, 27 Pac. 65.

7. Knoch v. Haizlip, 163 Cal. 146, 124 Pac. 998.

Prejudice alone sufficient.—There can be no question as to the sufficiency of the consideration where there is a benefit to the promisor as well as a detriment to the promisee.⁸ Both alternatives, however, are not essential.⁹ It is not necessary to the existence of a good consideration that a benefit should be conferred upon the promisor. It is enough that a “prejudice be suffered or agreed to be suffered” by the promisee.¹⁰ A consideration for a contract is equally valuable, whether it move to the promisor or to a third party.¹¹ The promisor is liable on an agreement to pay for service to be rendered, although a third person is the beneficiary.¹²

§ 118. Relinquishment of Right.—Any suspension or forbearance of a legal right constitutes a sufficient consideration for a contract.¹³ It may be the surrender, suspension, or forbearance, of a legal right to process for the enforcement of the collection of a debt, as, for example, the right to the process of attachment.¹⁴ Or it may consist in the waiver of a right to contest a will,¹⁵ in which case it is not material to show that a contest waived would

8. *Aden v. City of Vallejo*, 139 Cal. 165, 72 Pac. 905; *Dunton v. Niles*, 95 Cal. 494, 30 Pac. 762; *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 561, 86 Pac. 820.

9. *Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109, 1111 (on petition for rehearing).

10. Civ. Code, § 1605; *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027; *Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056; *Poetker v. Lowry*, 25 Cal. App. 616, 144 Pac. 981.

11. *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Barringer v. Warden*, 12 Cal. 311; *Creamery Package Mfg. Co. v. Bennett*, 32 Cal. App. Dec. 999, 192 Pac. 328; *Dunlap v. Sunset Lumber Co.*, 26 Cal. App. 131, 146 Pac. 53.

12. *Graig v. Fry*, 68 Cal. 363, 9

Pac. 550; *Meyers v. McKillop*, 37 Cal. App. 144, 173 Pac. 773.

13. Civ. Code, § 1605; *Fuller v. Towne*, 184 Cal. 89, 193 Pac. 88; *Estate of Colton*, 164 Cal. 1, 127 Pac. 643; *Naglee v. Lyman*, 14 Cal. 450; *Hart v. C. H. & O. B. Fuller Co.*, 31 Cal. App. Dec. 290, 188 Pac. 611. See *infra*, § 119, as to forbearance to sue.

14. *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *Frey v. Clifford*, 44 Cal. 335; *Naglee v. Lyman*, 14 Cal. 450; *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318; *Kinney v. Herspring & Co.*, 35 Cal. App. Dec. 709, 200 Pac. 737.

15. *Snowball v. Snowball*, 164 Cal. 476, 129 Pac. 784.

ultimately have been successful.¹⁶ The declination of the plaintiff to exercise his option in order that the defendant might have the opportunity of purchasing certain property for himself constitutes a sufficient consideration for the latter's promise to pay the former the said sum of money.¹⁷ So, too, the surrender of a claim to the possession of land is a sufficient consideration to support a contract,¹⁸ and the cancellation of a pre-existing debt,¹⁹ or of the security therefor,²⁰ is a valuable consideration. Likewise, the extinguishment of one obligation is always a good consideration for another obligation.¹ A party sued on a written agreement may show by parol that a subsequent written agreement was executed upon the consideration that the former agreement should be canceled and all claims thereunder waived.²

16. *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960.

17. *Flint v. Giguere*, 33 Cal. App. Dec. 742, 195 Pac. 85.

18. *Rogers Dev. Co. v. Southern California Real Estate Inv. Co.*, 159 Cal. 735, 35 L. R. A. (N. S.) 543, 115 Pac. 934.

19. *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296; *Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Scribner v. Hanke*, 116 Cal. 613, 48 Pac. 714; *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Gassen v. Hendrick*, 74 Cal. 444, 446, 16 Pac. 242; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. 659; *Sackett v. Johnson*, 54 Cal. 107; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Frey v. Clifford*, 44 Cal. 342; *Robinson v. Smith*, 14 Cal. 98; *Naglee v. Lyman*, 14 Cal. 454; *Payne v. Bensley*, 8 Cal. 266, 68 Am. Dec. 318; *Breeze v. Inter-*

national Banking Corp., 25 Cal. App. 437, 143 Pac. 1066; *Lyon v. Robertson*, 6 Cal. Unrep. 390, 59 Pac. 990 (holding widow liable on her note given in renewal of prior notes to which her deceased husband was party, though done under misapprehension as to her liability for his debts); *Kennedy v. Conroy*, 5 Cal. Unrep. 337, 44 Pac. 795. And see *infra*, § 125.

20. *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296; *Pauly v. Murray*, 110 Cal. 13, 42 Pac. 313; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320; *Simpson v. Smith*, 43 Cal. App. 94, 184 Pac. 507; *Miller & Lux v. Dunlap*, 28 Cal. App. 313, 152 Pac. 309; *Hoover v. Wasson*, 11 Cal. App. 589, 105 Pac. 945; *Lyon v. Robertson*, 6 Cal. Unrep. 390, 59 Pac. 990.

1. *Lagomarsino v. Gianinni*, 146 Cal. 545, 80 Pac. 698.

2. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159; *Bradley v. Bush*, 11 Cal. App. 287, 293, 104

A sufficient consideration may also be found in the extension of the time for the performance of a contract.³ The suspension of plaintiff's right to call for a compliance with his engagement is sufficient to support an action, even if it be the suspension of the right for a day only, or for ever so little a time. There is no necessity for an express agreement to delay. The taking of a new note, payable at a future day, imposes upon the payee the duty of waiting until the maturity of the new note.⁴

But the minds of the parties must meet on the relinquishment of the right before it can constitute a consideration.⁵

§ 119. Forbearance to Sue.—Forbearance to sue is a sufficient consideration to support a contract.⁶ An agreement to forbear suit is a "prejudice suffered or agreed to be suffered, by such person, other than such as he is at the time of consent, lawfully bound to suffer," within the meaning of section 1605 of the Civil Code. And it is immaterial whether the court is able to discover any actual benefit derived by the defendant or any substantial prejudice suffered by the plaintiff for such forbearance.⁷ But

Pac. 845, 847 (admitting parol evidence in action on notes to show agreement between defendant and plaintiff's agent as to surrender of notes).

3. *Stein v. Leeman*, 161 Cal. 502, 119 Pac. 663; *Rohrbacher v. Aitken*, 145 Cal. 485, 78 Pac. 1054; *McDonald v. Randall*, 139 Cal. 246, 72 Pac. 997; *Humboldt Sav. etc. Soc. v. Dowd*, 137 Cal. 408, 70 Pac. 274; *Whelan v. Swain*, 132 Cal. 389, 64 Pac. 560; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Stafford v. Hill*, 35 Cal. App. Dec. 509, 209 Pac. 33; *Hart v. C. H. & O. B. Fuller Co.*, 31 Cal. App. Dec. 290, 188 Pac. 611.

4. *Whelan v. Swain*, 132 Cal. 389, 64 Pac. 560.

5. *Williams v. Hasshagen*, 166 Cal. 386, 137 Pac. 9.

6. *Slankard v. Wagon*, 181 Cal. 125, 183 Pac. 562; *Papadakos v. Soares*, 177 Cal. 411, 170 Pac. 1114; *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *Smith v. Mott*, 76 Cal. 171, 18 Pac. 260; *Belloc v. Davis*, 38 Cal. 256; *Adams v. Hastings*, 6 Cal. 126, 65 Am. Dec. 496; *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677 (note executed by defendant under promise on part of payee that she would refrain from suing son of defendant); *Parsons v. Silva*, 1 Cal. App. 602, 82 Pac. 685.

7. *Papadakos v. Soares*, 177 Cal. 411, 170 Pac. 1114.

the mere forbearance to sue without agreement to forbear, or the mere act of forbearance if not given for the promise, does not constitute a consideration.⁸ A voluntary forbearance, not based upon any promise of the debtor to pay nor made the condition of such a promise is not sufficient.⁹ Furthermore, a forbearance is not a sufficient consideration if it is clear that no action would lie upon the claim.¹⁰ The forbearance of lienholders to foreclose their liens is not a sufficient consideration for a note when they are already under a legal obligation not to foreclose by the terms of a bond executed by them, and in canceling the lien they confer no benefit upon the owner to which he was not legally entitled, and suffer no detriment which they are not legally bound to suffer.¹¹ Where the creditor forbears to sue, upon the written request of the debtor, the debtor will be estopped to plead the statute, the running of which is suspended during the time of the forbearance as requested.¹²

Future contracts.—A covenant made by one person not to sue another for or in respect to any matter arising out of future contracts between them, or by reason of any future tort, would, of course, be utterly void, as the parties to such contract could not have in view any particular subject matter, or have any conception of the amount which might be involved in the causes of action upon which the covenant was to operate.¹³

Criminal prosecutions.—The rules stated above have reference, of course, to civil suits. A note executed in con-

8. Estate of Thomson, 165 Cal. 290, 131 Pac. 1045; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Smith v. Compton, 6 Cal. 24; Pacific Improvement Co. v. Maxwell, 26 Cal. App. 265, 146 Pac. 900.

9. Commercial Bank of Nevada v. Redfield, 122 Cal. 405, 55 Pac. 160, 772.

10. City Street Improv. Co. v. Pearson, 181 Cal. 640, 182 Pac. 962;

Spielberger v. Thompson, 131 Cal. 55, 63 Pac. 132, 678; Blyth v. Robinson, 104 Cal. 239, 37 Pac. 904.

11. Blyth v. Robinson, 104 Cal. 239, 37 Pac. 904.

12. State Loan etc. Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600. See LIMITATION OF ACTIONS.

13. In re Garcelon, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414.

sideration of a promise to refrain from prosecuting a person for a felony would be absolutely void, for such a contract would be opposed to public morals as well as public policy.¹⁴ It has been held, though, that where the evidence tended to show that defendant considered that a civil suit against her son would involve him in public disgrace, as exposing his bad faith and dishonesty, she had a sufficient incentive to execute the note in suit in consideration of forbearance of the plaintiff to sue her son; and that if such was the only agreement in fact, her mere belief that her son had committed a criminal offense would be immaterial.¹⁵

§ 120. Compromise of Claim.—It has been declared to be fixed policy of the law to encourage the settlement of disputes and the prevention of litigation, and when such settlement has been made, acted upon and acquiesced in, parties will not be permitted to violate the compact unless circumstances of fraud or undue influence are shown.¹⁶ The mutual release of their respective rights by the parties, and the desire to avoid lawsuits and notoriety, form the consideration for such compromises.¹⁷ The compromise of even a doubtful claim asserted in good faith constitutes a sufficient consideration for a new promise.¹⁸ This is true though it may ultimately be found that the claimant

14. See COMPOUNDING CRIMES, vol. 5, p. 379.

15. Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677.

16. Downing v. Murray, 113 Cal. 462, 45 Pac. 869; Ifield v. Porter, 34 Cal. App. Dec. 963, 198 Pac. 429; Dickie v. Steiger, 4 Cal. App. 622, 88 Pac. 814; Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. 255. See COMPROMISE AND SETTLEMENT, vol. 5, p. 383.

17. City Street Improvement Co. v. Pearson, 181 Cal. 640, 185 Pac. 962; Fairchild v. Cartwright, 39

Cal. App. 118, 178 Pac. 333; Dickie v. Steiger, 4 Cal. App. 622, 88 Pac. 814.

18. Gardner v. Watson, 170 Cal. 570, 150 Pac. 994; Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708; Fairchild v. Cartwright, 39 Cal. App. 118, 178 Pac. 333; Randisi v. Simone, 26 Cal. App. 661, 147 Pac. 1176; Murray Showcase etc. Co. v. Sullivan, 15 Cal. App. 475, 115 Pac. 261; Dickie v. Steiger, 4 Cal. App. 622, 88 Pac. 814.

could not have prevailed.¹⁹ An agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards comes out that the right was on the other side, is binding, and the right shall not prevail against the agreement of the parties, for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.²⁰ And it is immaterial if other matters than the compromise of the claim may have entered into the consideration.¹

It has generally been recognized, however, that to make a compromise of a claim, even though the same be in suit, sufficient to constitute a consideration for a new promise, the claim must not be wholly without foundation and known to the claimant to be so.² A promise to compromise a claim utterly unfounded will not be regarded as a valid consideration.³ The same is true when the claim involved in the compromise is wholly based upon an unlawful consideration, as distinguished merely from an insufficient consideration.⁴ The partial performance of an agreement of compromise, which is an integral part of the agreement, will suffice to make the agreement an effective extinguishment of the antecedent obligation upon which it was founded, where the only thing remaining to

19. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 764, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *Murray Showcase etc. Co. v. Sullivan*, 15 Cal. App. 475, 115 Pac. 259.

20. *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994.

1. *Randisi v. Simone*, 26 Cal. App. 661, 147 Pac. 1176.

2. *Snowball v. Snowball*, 164 Cal. 476, 129 Pac. 784; *Union Collection*

Co. v. Buckman, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708.

3. *City Street Improv. Co. v. Pearson*, 181 Cal. 640, 185 Pac. 962; *Spielberger v. Thompson*, 131 Cal. 55, 63 Pac. 132, 678; *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822.

4. *Union Collection Co. v. Buckman*, 15 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708 (notes given for gambling debt).

be done is capable of performance and relates merely to an incidental provision of the agreement.⁵

An oral agreement is not void for lack of consideration if it is based "on the existence and settlement of disputes between the parties."⁶ In view of the provisions of subdivision 3 of section 2794 of the Civil Code, such an agreement is not required to be in writing.⁷

§ 121. Compromise of Action.—Where legal proceedings have been instituted, and the parties, after investigation, in the absence of fraud, make a compromise agreement, and the proceedings are in consideration thereof dismissed, the dismissal of the proceedings constitutes a consideration for the agreement.⁸ The compromise of litigation in which a person has an interest is not only a valuable consideration, but also may be an adequate one for an obligation executed by such person;⁹ and it matters not whether the obligation was primarily his own, or was entered into in behalf of some of his co-obligors.¹⁰ An agreement, being a voluntary settlement of a controversy made during the pendency of an appeal from a judgment embodying the controversy, becomes as binding and effective upon all of the parties as the judgment itself would have been had it become final.¹¹ The parties cannot afterwards make the agreement depend upon the question as to whether or not the party could have prevailed in

5. *Armstrong v. Sacramento Valley Realty Co.*, 179 Cal. 648, 178 Pac. 516.

6. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159; *Credit Clearance Bureau v. Hochbann etc. Co.*, 25 Cal. App. 546, 144 Pac. 315.

7. *Fairchild v. Cartwright*, 39 Cal. App. 118, 178 Pac. 333.

8. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 710; *Rohrbacher v. Aitken*, 145 Cal. 485, 78

Pac. 1054; *Security etc. Bank of San Diego v. Sietz*, 30 Cal. App. Dec. 28, 185 Pac. 188.

9. *Spielberger v. Thompson*, 131 Cal. 55, 63 Pac. 132, 678; *Armstrong v. Sacramento Valley Realty Co.*, 34 Cal. App. Dec. 884, 198 Pac. 217.

10. *Armstrong v. Sacramento Valley Realty Co.*, 34 Cal. App. Dec. 884, 198 Pac. 217.

11. *Armstrong v. Sacramento Valley Realty Co.*, 179 Cal. 648, 178 Pac. 516.

such proceeding. If so, no compromise agreement would be valid.¹² Not only will such agreements, when there is no fraud, be sustained by the courts, but they are highly favored as productive of peace and goodwill in the community, and reducing the expense and persistency of litigation.¹³

The settled rule that the compromise of a doubtful claim is sufficient consideration for a new promise¹⁴ is especially applicable where legal proceedings to enforce the asserted claim have been commenced and are pending and the proceedings are discontinued in pursuance of such compromise.¹⁵ Where there has been a compromise of doubtful claims, or concessions and benefits given and received in good faith, as consideration for a promise, the actual validity of the claims is immaterial; otherwise there could be no compromise of litigation, since there is no litigation in which one or the other party, if the case be pressed to judgment, does not fail to make out his case.¹⁶ Likewise, the rule that a compromise, in order to constitute good consideration, must be based upon a claim having some foundation, applies when the claim is in suit.¹⁷ So the dismissal of an action by plaintiff for personal injuries in pursuance of a settlement agreement will not be set aside merely on a showing that the consideration paid plaintiff was small and inadequate, if such inadequacy

12. *Rohrbacher v. Aitken*, 145 Cal. 485, 78 Pac. 1054.

13. *Armstrong v. Sacramento Valley Realty Co.*, 179 Cal. 648, 178 Pac. 516; *Rohrbacher v. Aitken*, 145 Cal. 485, 78 Pac. 1054; *Bank of Commerce v. Scofield*, 126 Cal. 156, 58 Pac. 451 (applying rule to mortgage given in satisfaction of prior mortgage); *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822. See COMPROMISE AND SETTLEMENT, vol. 5, p. 383.

14. See *supra*, § 120.

15. *Union Collection Co. v. Buck-*

man, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 710; *Rohrbacher v. Aitken*, 145 Cal. 485, 78 Pac. 1054; *Spielberger v. Thompson*, 131 Cal. 55, 63 Pac. 132, 678; *Bank of Commerce v. Scofield*, 126 Cal. 156, 58 Pac. 451; *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822.

16. *City Street Improvement Co. v. Pearson*, 181 Cal. 640, 185 Pac. 962; *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822.

17. *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822.

is not such as to shock the conscience, and there is no showing of fraud in making the settlement.¹⁸

§ 122. Performance of Legal Obligation.—The Civil Code provides that

“An existing legal obligation resting upon the promisor . . . is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.”¹⁹

Neither the promise to do, nor the actual doing of that which the promisor is by law or subsisting contract bound to do, is a sufficient consideration to support a promise made to the person upon whom the legal liability rests, either to induce him to perform what he is bound to do, or to make a promise so to do.²⁰ The consideration of the original contract cannot attach to the subsequent promise.¹ This is merely the converse of the rule stated in section 1605 of the Civil Code to the effect that any benefit to the promisor to which he is not legally entitled, or a detriment to the promisee which he is not lawfully bound to suffer, is a good consideration.² Thus, part payment of a debt overdue is not a valid consideration for an agreement to postpone or discharge the payment of the residue.³ And

18. *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153. See *RELEASE*.

19. Civ. Code, § 1606.

20. *Gordon v. Green*, 34 Cal. App. Dec. 791, 197 Pac. 955; *Gordon v. Green*, 34 Cal. App. Dec. 791, 197 Pac. 955; *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303; *MacKenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36; *Sullivan v. Sullivan*, 99 Cal. 187, 33 Pac. 862; *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829; *Deland v. Hiett*, 27 Cal. 611, 87 Am. Dec. 102; *Magee v. Brenneman*, 35 Cal. App. Dec. 772 (application for rehearing denied, 36 Cal. App. Dec. 13); *Jor-*

dan v. Scott, 38 Cal. App. 739, 171 Pac. 504; *Pacific Rys. Advertising Co. v. Carr*, 29 Cal. App. 722, 157 Pac. 529; *Benedict v. Greer-Robbins Co.*, 26 Cal. App. 468, 147 Pac. 486; *Poetker v. Lowry*, 25 Cal. App. 616, 144 Pac. 981.

1. *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303; *Ellison v. Jackson Water Co.*, 12 Cal. 542.

2. *Schaadt v. Mutual Life Ins. Co.*, 2 Cal. App. 715, 84 Pac. 249.

3. *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; *Liening v. Gould*, 13 Cal. 598; *Jordan v. Scott*, 38 Cal. App. 739, 177 Pac. 504.

an agreement to discharge a judgment for a sum less than the amount for which it was rendered is void.⁴ A promise by one to fulfill his contract with another is no consideration for a promise by a third person to pay him for such contract.⁵ Nor can support which one person is already legally bound to give another form a consideration for a contract between the two,⁶ or between one of them and a stranger. The law imposes upon parents the duty of caring for and supporting their children, and the agreement of the mother of a minor child not to surrender the child to a stranger, who desires to receive, care for and maintain it, but to retain the custody and continue to care for and support the child herself, is not a legal consideration for a contract on the part of a stranger, who promises to pay the mother the reasonable value of such care and support, and enforcement of such an agreement would contravene public policy.⁷

§ 123. Increased Compensation.—The courts in some jurisdictions have held that where one party to a contract refuses to go on with it, and the other party, in order to induce him to go on, promises to pay him additional compensation, such promise is supported by a consideration. The theories upon which this conclusion is reached are various, and it has been said that it is exceedingly doubtful if any of them are sound.⁸ But the authorities are in practical agreement that where all that appears is that one party found himself with a losing contract and, without abandoning it, requested the other party to pay him more, which the other party promised to do, the promise

4. *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829; *Deland v. Hiatt*, 27 Cal. 611, 87 Am. Dec. 102.

5. *Ellison v. Jackson Water Co.*, 12 Cal. 542.

6. *Jordan v. Scott*, 38 Cal. App.

739, 177 Pac. 504; *Estate of Casner*, 1 Cal. App. 145, 81 Pac. 991.

7. *Poetker v. Lowry*, 25 Cal. App. 616, 144 Pac. 981.

8. *Western Lithograph Co. v. Vanomar Producers*, 61 Cal. Dec. 425, 197 Pac. 103, per Olney, J.

is without consideration.⁹ Unexpected increases in manufacturing costs are a risk which every manufacturer assumes and contemplates when he enters into a contract to make goods for future delivery. The risk of fluctuations in the market price of labor and materials is a burden every contractor necessarily contemplates and assumes when he makes a contract.¹⁰

§ 124. Moral Obligation.—Although it is true that neither courts of equity nor courts of law enforce mere moral obligations,¹¹ yet, in some instances, a moral obligation may form a sufficient consideration for a promise.¹² The code provides that

“An existing . . . moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.”¹³

The moral obligation which may be treated as a consideration seems to be an obligation of justice, and not of benevolence or piety, or, as it has been stated, a moral obligation is sufficient to support an express promise where a good and valuable consideration has once existed.¹⁴ When a debt has been discharged by proceedings in insolvency, or has become barred by the statute of limitations, the remedy to enforce the payment of the debt is

9. *Western Lithograph Co. v. Vanomar Producers*, 61 Cal. Dec. 425, 197 Pac. 103; *Jordan v. Scott*, 38 Cal. App. 739, 177 Pac. 504.

10. *Western Lithograph Co. v. Vanomar Producers*, 61 Cal. Dec. 425, 197 Pac. 103, per Olney, J.

11. *Becker v. Schwerdtle*, 6 Cal. App. 462, 92 Pac. 398.

12. *Osmont v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731 (agreement by one partner, upon dissolution of firm, to wind up its

affairs). And see cases cited *infra*, this section.

According to Professor Williston, a previous moral obligation is generally held an insufficient consideration in the United States, although, in a few states the doctrine of moral obligation is still recognized. See 1 Williston on Contracts, p. 329 et seq.

13. Civ. Code, § 1606.

14. *Sullivan v. Sullivan*, 99 Cal. 187, 33 Pac. 862; *Hopkins v. Delaney*, 8 Cal. 84.

gone, but the moral obligation to pay it still remains and is a good consideration for a new promise to make such payment.¹⁵ The moral obligation to pay the debt does not depend at all upon the question whether it is considered that the debt itself is barred by the statute, or only the remedy, but upon the fact that the debtor has received and the creditor parted with the consideration for the debt, that it has never been in fact paid, and that in foro conscientiae it ought to be paid, notwithstanding the bar.¹⁶ Likewise, a moral obligation resting on an employer to care for an injured employee may constitute sufficient consideration for an agreement to pay the charges for such care.¹⁷ But the fact that a father promised the mother of a child upon her death-bed that the child should have certain property is not a sufficient consideration for a deed.¹⁸ And it has been held that where services are rendered to another without any request and under circumstances which do not raise an implied contract to pay for them, a promise founded on motives of honor or gratitude is not on a sufficient consideration.¹⁹

Where a landlord agrees to allow his tenant a reasonable time, after the expiration of the lease, to remove his buildings, and the tenant surrenders or forfeits the lease, before the expiration thereof, the intention of the parties must be confined to its legal expiration, and not to the wrongful act of the lessee, in terminating it, and the lessee

15. *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13; *Mull v. Van Trees*, 50 Cal. 547; *Chabot v. Tucker*, 39 Cal. 434; *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Hopkins v. Delaney*, 8 Cal. 85; *Hoover v. Wasson*, 11 Cal. App. 589, 105 Pac. 945. See LIMITATION OF ACTIONS.

16. *Chabot v. Tucker*, 39 Cal. 434; *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170.

17. *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817;

Deane v. Gray Bros. etc. Co., 109 Cal. 433, 42 Pac. 443; *Fraser v. San Francisco Bridge Co.*, 103 Cal. 79, 36 Pac. 1037; *Scott v. Monte Cristo Oil Co.*, 15 Cal. App. 458, 115 Pac. 66. See MASTER AND SERVANT.

18. *Peek v. Peek*, 77 Cal. 106, 11 Am. St. Rep. 244, 1 L. R. A. 185, 19 Pac. 227.

19. *Pacific Rys. Advertising Co. v. Carr*, 29 Cal. App. 722, 157 Pac. 529. See WORK AND LABOR.

can claim no rights under the contract. There is no moral obligation, under such circumstances, sufficient, as a consideration, to support a subsequent promise of the landlord to allow the tenant to remove his buildings.²⁰

§ 125. Past Benefit or Detriment.—According to a rather abstruse doctrine, a past and executed consideration is not sufficient.¹ The theory is that a past executed consideration will not support any promise different from that which the law implies, which is a promise to pay in *praesenti*, on request, and that an executed consideration will not support a promise to pay in *futuro*.² Thus one who adds his signature to a promissory note as a maker or indorser, after its execution and delivery to the payee, without any agreement for extension of credit or forbearance, or other new consideration, is not liable thereon.³ Similarly, a mortgage given by a wife on her separate property to secure her husband's antecedent debt, without new consideration to husband or wife, is not obligatory.⁴ And services rendered to a deceased husband in his lifetime do not form a sufficient consideration for an agreement by the wife to pay for them, she being under no legal or moral obligation to pay.⁵

An exception to the rule that a past consideration is no consideration is the case of services rendered on request, no promise of remuneration being made at the time, but subsequently an express promise being made to pay for them.⁶ Likewise a pre-existing debt may, under some

20. *Whipley v. Dewey*, 8 Cal. 36. Cal. 545, 80 Pac. 698; *Leverone v. Hildreth*, 80 Cal. 139, 22 Pac. 72. See LANDLORD AND TENANT.

1. *People v. Kelly*, 38 Cal. 145, 93 Am. Dec. 360; *Mulford v. Estudillo*, 17 Cal. 618; *Comstock v. Breed*, 12 Cal. 286.

2. *Parke etc. Co. v. San Francisco Bridge Co.*, 145 Cal. 534, 78 Pac. 1065, 79 Pac. 71 (stating the rule).

3. *Lagomarsino v. Gianinni*, 146

See NEGOTIABLE INSTRUMENTS.

4. *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028.

5. *Royer v. Kelly*, 174 Cal. 70, 161 Pac. 1148.

6. *Magee v. Brennehan*, 35 Cal. App. Dec. 772 (quoting from *Beach on the Modern Law of Contracts*).

circumstances, constitute a valuable consideration.⁷ There is a fundamental difference between a mere promise to pay an existing debt made upon no new consideration and a promise to pay it which is founded on a new consideration such as further forbearance, to which the creditor binds himself by accepting the new promise or by some other valid agreement, or a new promise which has the effect of merging the original obligation and in effect extinguishing it as a living contract.⁸ A conveyance or transfer of property in consideration of the discharge of a pre-existing indebtedness,⁹ or merely as security for the payment thereof,¹⁰ is a conveyance for a valuable consideration. Similarly, an order to pay money given as collateral security for a pre-existing indebtedness is based upon sufficient consideration.¹¹ And this rule applies even though the debt is barred by the statute of limitations.¹²

It has been held that the doctrine that a past or executed consideration is not sufficient did not apply where, although the question of the performance of past services was involved, nevertheless the agreed compensation was to be contingent upon the securing of future contracts, and by the written agreement of the parties they merely put into permanent written form what they finally agreed upon as to the future contingent compensation.¹³ The mere fact that a bond recites that an agreement had been made, as therein recited, does not show, or tend to show,

7. See cases cited supra, § 118.

8. *Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156, per Shaw, J.

9. *Smith v. McCullough*, 182 Cal. 530, 189 Pac. 686; *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158, 48 Pac. 66; *Saunderson v. Broadwell*, 82 Cal. 133, 23 Pac. 30; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Virginia etc. Co. v. Glenwood Lumber Co.*, 5 Cal. App. 256, 90 Pac. 48.

10. *Smitton v. McCullough*, 182

Cal. 530, 189 Pac. 686. See *DEEDS*.

11. *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 561, 86 Pac. 820.

12. *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40; *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13; *Wells v. Harter*, 56 Cal. 342; *Chabot v. Tucker*, 39 Cal. 436; *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170.

13. *Parke etc. Co. v. San Francisco Bridge Co.*, 145 Cal. 534, 78 Pac. 1065.

that the bond was induced by a past and executed consideration.¹⁴

§ 126. Agreement Supplementing or Modifying Prior Agreement.—An agreement made pursuant to a previous contract which was supported by a consideration may be regarded as a part of that contract and therefore based upon a sufficient consideration. In other words, where a contract contemplates the subsequent execution of a subsidiary agreement, the promises in such agreement are supported by the consideration of the original contract. But where the original contract does not contemplate the making of another agreement, the original consideration will not support such subsequent agreement.¹⁵ Accordingly, a contract adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties, without any compensating advantage, requires consideration to support it. But this, of course, may consist either in a new consideration, or in some favorable modification of the original contract.¹⁶ There is an exception to this rule provided in the Code of Civil Procedure, section 1697, for the case of parol contracts; but this has no application to written contracts.¹⁷ The fact that the supplemental agreement is also described as “explanatory” of the first agreement executed at a previous date is not conclusive that it is part of the original agreement, though not included in the writing, so as to be supported by the original consideration.¹⁸

Agreement to accept part payment.—The general rule is that where there is no new consideration—no benefit

14. *Mulford v. Estudillo*, 17 Cal. 618.

15. *Estate of Thomson*, 165 Cal. 290, 131 Pac. 1045; *Ellison v. Jackson Water Co.*, 12 Cal. 542.

16. *Main St. etc. R. R. Co. v. Los Angeles Traction Co.*, 129 Cal.

301, 61 Pac. 937; *Anderson v. Adler*, 42 Cal. App. 776, 184 Pac. 42.

17. *Main St. etc. Co. v. Los Angeles Trac. Co.*, 129 Cal. 301, 61 Pac. 937.

18. *Main St. etc. Co. v. Los Angeles Trac. Co.*, 129 Cal. 301, 61 Pac. 937.

accruing to the creditor and no damage to the debtor—the creditor may violate with impunity a promise made to his debtor to accept a sum less than that due, however freely and understandingly made.¹⁹ Section 1524 of the Civil Code, providing in modification of this rule that “Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation,” applies to written agreements only.²⁰ An agreement by the terms of which a creditor accepts in extinction of an obligation a less sum than that due from the obligor must be founded upon a sufficient consideration where there is no writing, as provided by section 1524 of the Civil Code; the fact that the debtor is insolvent, or that a genuine controversy exists as to the amount of the obligation, may constitute such a consideration.¹

Indemnity contract.—A third party indorsing a contract simultaneously with the making thereof and agreeing that an undertaking of one of the parties shall be fulfilled, makes the contract his own, and a consideration therein expressed becomes consideration for his promise.² But a contract of indemnity against liability on a promissory note does not operate as a release so as to be effective under section 1541 of the Civil Code without consideration.

19. *Peachy v. Witter*, 131 Cal. 316, 63 Pac. 468. See for full discussion of part payment, *ACCORD AND SATISFACTION*, vol. 1, p. 129 et seq.

20. *Scheeline v. Moshier*, 72 Cal. 565, 158 Pac. 222.

1. *Cloyne v. Levy*, 26 Cal. App. 637, 148 Pac. 224.

2. *Otis v. Hazeltine*, 27 Cal. 80. Sec, also, *Citizens' Trust & Savings Bank v. Bryant*, 35 Cal. App. Dec.

823, 200 Pac. 823 (holding that it cannot be successfully urged that there was no consideration for a guaranty to pay part of a debt, evidenced by a note secured by a mortgage, because the date of the guaranty was of a later date than that of the note and mortgage, where the facts show there was but one transaction and that the note and mortgage were not accepted until the guaranty was furnished). See *GUARANTY*.

The provision of that section making a release in writing of an obligation valid and binding without a new consideration therefor has application only to instruments which by their terms purport to be formal releases, and does not include instruments or contracts which might operate as such indirectly, but which upon their face purport to give a right upon which an affirmative action would lie.³

§ 127. Promise as Consideration for Promise.—A promise by one party may be a sufficient consideration for the promise of another; and where there are mutual or reciprocal promises in a written agreement, each constitutes a consideration for the other, particularly where it is expressly so declared.⁴ As the rule has been otherwise stated, mutual promises are concurrent considerations, and support each other, unless one or the other be void, in which case, there being no consideration on one side, no contract can arise.⁵ But where parties assume to make

3. *Rogers v. Kimball*, 121 Cal. 247, 53 Pac. 648 (decision of department in same case, reported 5 Cal. Unrep. 725, 47 Pac. 719, not sustained); *Upper etc. Canal Co. v. Roach*, 78 Cal. 552, 21 Pac. 304. See RELEASE.

4. *Slankard v. Wagon*, 181 Cal. 135, 183 Pac. 562 (sale of land); *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273 (preferential sale of stock); *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004 (conditional sale of personal property); *Knoch v. Haizlip*, 163 Cal. 146, 124 Pac. 998 (grants of easements by coterminous land owners); *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305; *Gallagher v. Equitable etc. Co.*, 141 Cal. 699, 75 Pac. 329 (agreement for gas supply); *Smith v. Blandin*, 133 Cal. 441, 65 Pac. 894 (sale of land); *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39 (deed of water right); *Van Loben*

Sels v. Bunnell, 120 Cal. 680, 53 Pac. 266; *Southern Pac. R. R. Co. v. Allen*, 112 Cal. 455, 44 Pac. 796 (sale of land); *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280 (sale of land); *Mound City L. & W. A. v. Slauson*, 65 Cal. 425, 4 Pac. 396 (sale of land); *Christian College v. Hendley*, 49 Cal. 347 (subscription agreement); *Flint v. Giguere*, 33 Cal. App. Dec. 742, 195 Pac. 85 (waiver of option rights); *Matzen v. Morton Bldg. Co.*, 28 Cal. App. 330, 152 Pac. 317 (forbearance to enforce lien claims).

5. *Papadakos v. Soares*, 177 Cal. 411, 170 Pac. 1114; *Rogers Dev. Co. v. Southern Cal. Real Estate Inv. Co.*, 159 Cal. 735, 35 L. R. A. (N. S.) 543, 115 Pac. 935; *Gallagher v. Equitable Gas L. Co.*, 141 Cal. 699, 75 Pac. 329; *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829; *Leslie v. Conway*, 59 Cal. 442.

a contract in which a promise is the consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise.⁶ If a number of persons subscribe to a paper, in which they promise to contribute money for the accomplishment of an object of interest to all, as the erection of a building for a college,⁷ or for the organization of a corporation,⁸ their mutual promises constitute mutual obligations, and are a sufficient consideration to support the promise of each. Similarly, when creditors mutually agree to forego their right to pursue the usual method of enforcing their demands in consideration of being paid at a given time, the engagement of each is a sufficient consideration for the engagement of the others to do the same.⁹ An agreement to convey real property in consideration of an agreement on the part of the grantee that she will devise such property to the grantor free and clear of all encumbrances on her death, and without other consideration, when properly evidenced, is valid and binding and may be enforced by a court of equity.¹⁰

6. *Hamlin v. Barnhart*, 26 Cal. App. 632, 147 Pac. 1188 (quoting Page on Contracts).

If A and B make mutual promises to each other, and A is to have the right at his election to withdraw from the contract and relieve himself from all liability thereunder at his pleasure, such contract is without consideration. If, however, A must give notice for a substantial period of time before ending his liability under the contract, and such liability is to last until the end of time for which the notice is given, A's promise is a consideration. Thus if A has the right to end the contract

at the end of any year, or on ten days' notice, or on two weeks' notice, A's promise is a consideration. *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823 (quoting Page on Contracts).

7. *Christian College v. Headley*, 49 Cal. 347. See SUBSCRIPTIONS.

8. *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123. See CORPORATIONS.

9. *Wilson v. Samuels*, 100 Cal. 514, 35 Pac. 148, 559. See COMPOSITIONS WITH CREDITORS, vol. 5, p. 373.

10. *Rundell v. McDonald*, 41 Cal. App. 175, 182 Pac. 450. As to agreements to devise property, see *WILLS*.

§ 128. Adequacy of Amount.—The adequacy of the consideration is an element of the good faith of a transaction, and has no bearing upon whether the consideration is a valuable or a good one.¹¹ Where parties are both in a situation to form an independent judgment concerning a transaction, and act knowingly and intentionally, mere inadequacy in the price, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract.¹² If the amount named is not adequate, a vendor should so determine in his own mind before he signs the contract, but having signed it and stated the amount for which he will sell, he must live up to his agreement. Any other rule would, it has been said, make a contract worthless and mere waste paper.¹³ In fact, inadequacy of consideration alone, without fraud or something of the nature of fraud, is never considered even in equity, except as a defense to the right to enforce specifically an executory agreement.¹⁴ It may be a circumstance more or less potential in the determination of fraud as a question of fact,¹⁵ but inadequacy of consideration, at least unless such as to shock the conscience, is not of itself sufficient to authorize the court to find fraud, as a conclusion of law.¹⁶

11. *Slankard v. Wagon*, 181 Cal. 135, 183 Pac. 562 (holding mutual promises of parties and settlement of controversy existing between them constituted adequate consideration to support contract); *Smith v. Bangham*, 156 Cal. 359, 28 L. R. A. (N. S.) 522, 104 Pac. 689 (holding consideration adequate); *Frey v. Clifford*, 44 Cal. 335, 342; *Clark v. Troy*, 20 Cal. 219, 224; *Denehy v. Stewart*, 41 Cal. App. 88, 181 Pac. 839; *Rogers v. Scott*, 28 Cal. App. 93, 151 Pac. 379 (holding consideration adequate); *Lindley v. Blumberg*, 7 Cal. App. 140, 93 Pac. 894.

12. *Hallidie v. First Federal Trust Co.*, 177 Cal. 600, 171 Pac. 431

(quoting from *Pomeroy's Equity Jurisprudence*); *Riegel v. Wolenshlager*, 33 Cal. App. Dec. 171, 193 Pac. 160. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 786.

13. *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970.

14. *Smith v. Bangham*, 156 Cal. 359, 28 L. R. A. (N. S.) 522, 104 Pac. 689. See SPECIFIC PERFORMANCE.

15. *McFadden v. Mitchell*, 54 Cal. 628; *Clark v. Troy*, 20 Cal. 220; *Boyd v. Bearce*, 32 Cal. App. Dec. 456, 191 Pac. 560.

16. *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153; *McFadden v. Mitchell*, 54 Cal. 628; *Jami-*

The time to which the question of adequacy must relate is that of the formation of the contract.¹⁷ It is not necessary in a contract of sale that there be the highest possible price, but only a consideration which is adequate under all the circumstances.¹⁸ Exact or even substantial equality in the value of the property at the time of the contract, as the court finds it to be, and the price fixed by the contract, is not the only circumstance to be considered in determining the adequacy of the consideration. The relations of the parties, and their love, affection or regard for each other, as well as the object to be attained by the contract, may be given some effect.¹⁹

<See "Erratum", 1926 Supp. 450> Under section 3391 of the ~~Code of Civil Procedure~~ ^{Cal. Civ. Code} inadequacy of consideration is made a distinct ground for refusing a specific performance of a contract, independently of the question whether it amounts to evidence of fraud. Hence, although there may be a consideration sufficient to support a contract at law, still if it is not adequate a court of equity will not grant a specific performance.²⁰

Legality.

§ 129. **In General.**—The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy.¹

son v. King, 50 Cal. 132. See
FRAUD AND DECEIT; FRAUDULENT
CONVEYANCES.

17. Morrill v. Everson, 77 Cal.
114, 19 Pac. 190. ~~See also, 24~~
~~Cal. App. Dec. 992, 198 Pac. 640.~~

18. Morrill v. Everson, 77 Cal.
144, 19 Pac. 190. See SALES.

19. O'Hara v. Wattson, 172 Cal.
525, 157 Pac. 608, per Shaw, J.
See SALES; VENDOR AND PURCHASER.

20. Newman v. Freitas, 129 Cal.
283, 50 L. R. A. 548, '61 Pac. 907;
Morrill v. Everson, 77 Cal. 114, 19
Pac. 190. See SPECIFIC PERFORM-
ANCE.

1. Howell v. City of Hamburg
Co., 165 Cal. 172, 171 Pac. 130
(lease of unlawful building to be
constructed); Thom v. Stewart, 162
Cal. 413, 122 Pac. 1069 (note given
in consideration of promise not to

It is in accord with the express provision of section 1607 of the Civil Code that

“The consideration of a contract must be lawful within the meaning of section sixteen hundred and sixty-seven.”

Section 1667 reads as follows:

“That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or 3. Otherwise contrary to good morals.”²

The application of these provisions is, as has been seen, affected by situations where the parties are not in *pari delicto*, and by the rule that where a class of contracts is prohibited by statute for the protection of particular parties, other parties cannot take advantage of the ille-

prosecute for embezzlement); *Colby v. Title Insurance & Trust Co.*, 160 Cal. 632, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913 (conveyances in consideration of compounding of felony); *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 586, 88 Pac. 708 (non-negotiable promissory notes given for gambling debt); *Estate of Wood*, 137 Cal. 148, 69 Pac. 981 (contract in consideration of illegal marriage); *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777 (discussing illegal contracts generally); *Daw v. Niles*, 104 Cal. 106, 37 Pac. 876; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880; *Swanger v. Mayberry*, 59 Cal. 91 (note given for part of purchase money of timber growing on public lands); *Ladda v. Hawley*, 57 Cal. 51 (contract of pre-emptor of public land, before payment, permitting another to cut timber); *King*

v. Johnson, 80 Cal. App. 63, 157 Pac. 531 (an agent, for the sale of land subdivided into lots, who offers the lots for sale with the full knowledge that the provisions of the act of March 15, 1907, Stats. 1907, p. 290, requiring the filing of a map or plat of the subdivision, have not been complied with, cannot maintain a suit for his compensation, as the consideration for the contract is an illegal act); *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25 (void lease); *Le Tourneaux v. Gilliss*, 1 Cal. App. 546, 82 Pac. 627 (note given to raise money for “lobbying” purposes); *Benicia Agr. Works v. Estes*, 3 Cal. Unrep. 855, 32 Pac. 938 (mortgage). See *supra*, §§ 58-112.

2. *Teachout v. Bogy*, 175 Cal. 481, 166 Pac. 319; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880. See *supra*, §§ 58-112, as to illegal contracts generally.

gality.³ So, too, a negotiable promissory note the consideration of which is against public policy, when transferred to an innocent holder before its maturity, is purged of the objection, and will be enforced.⁴ And it is held that sections 1607 and 1667 of the Civil Code have no application to the validity of bank loans in excess of statutory limits.⁵ Mere repetition of a promise based on an illegal consideration cannot give it validity.⁶ And if a contract is void, due to a whole or a part of the consideration being illegal, it cannot be validated by the subsequent substitution of good consideration for the bad, so as to permit an action upon the executed portion.⁷

If the whole or a part of a consideration be that a trustee resign his trust, the consideration is illegal.⁸ A contract in consideration of future illicit cohabitation is, of course, void. It seems to have been the rule formerly that a contract, under seal, for past illicit cohabitation, could not for that reason be avoided; but that a written contract, not under seal, could be avoided. The distinction may perhaps have been done away with by the code.⁹ In an action on a promissory note, given in satisfaction of a judgment obtained by plaintiff against certain parties for money which they had wrongfully appropriated and against whom a criminal proceeding was pending, it cannot be held that the consideration was illegal, where it is not shown that the note was given on an agreement to dismiss the criminal proceeding or not to prosecute.¹⁰

3. *Savings Bank v. Burns*, 104 Cal. 473, 38 Pac. 102. See *supra*, §§ 108, 109.

4. *Thorne v. Yontz*, 4 Cal. 321 (note given to procure removal of state capital). See NEGOTIABLE INSTRUMENTS.

5. See *BANKS*, vol. 4, p. 276.

6. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708.

7. *Teachout v. Bogy*, 175 Cal. 481, 166 Pac. 319; *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022; *Ladda v. Hawley*, 57 Cal. 51.

8. *Forbes v. McDonald*, 54 Cal. 98. See TRUSTS.

9. *Sharon v. Sharon*, 68 Cal. 29, 8 Pac. 614. See BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 456.

10. *Ogden v. Ford*, 179 Cal. 243, 176 Pac. 165. See COMPOUNDING CRIMES, vol. 5, p. 379.

If the consideration is illegal as being against public policy, good morals or the express mandate of the law, the contract cannot be made the basis of any action, legal or equitable; and it is the duty of the court to make inquiry upon that subject, and to withhold relief, if satisfied that such is the fact.¹¹ Neither the silence nor the consent of the parties justifies the court in retaining jurisdiction of such an action.¹²

Illegality of consideration cannot be shown, unless specially pleaded.¹³ But when the answer shows the illegality, it is not necessary to allege the mere conclusion of law that the consideration was illegal.¹⁴ Where the answer does not deny the contract but alleges that the consideration is illegal, the burden is upon the defendant to prove the affirmative matter thus set up in his answer.¹⁵

Locus poenitentiae.—Although the rule that a court will not aid either party to a contract supported by an illegal consideration is, as to executed contracts of such nature, of almost universal application, it is equally true that as to like contracts which are executory the law recognizes what is termed a *locus poenitentiae* accorded to a plaintiff, which is an opportunity to repudiate the agreement and refuse to be a party to the acts contemplated thereby. Persons may not be punished, either criminally or civilly, for mere wrongful intentions. It is the consummation of such intentions that subjects them to the effects of the law.¹⁶ Thus, it is generally held that a party to a wager,

11. *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, 9 L. R. A. (N. S.) 568, 88 Pac. 708; *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25; *Le Tourneaux v. Gilliss*, 1 Cal. App. 551, 82 Pac. 629. See as to illegal contracts, *supra*, §§ 58-112.

12. *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 33 L.

R. A. 750, 45 Pac. 1015; *Valentine v. Stewart*, 15 Cal. 387.

13. *Sharon v. Sharon*, 68 Cal. 29, 8 Pac. 614.

14. *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022.

15. *Frantz v. Harper*, 6 Cal. Unrep. 560, 62 Pac. 603. See PLEADING.

16. *Glos v. McBride*, 32 Cal. App. Dec. 370, 191 Pac. 67, per Shaw, J. See *supra*, §§ 108, 109.

where the money is deposited with a stakeholder, may at any time before the event is determined repudiate the wager and demand the return of his money.¹⁷ Likewise, where a contract contemplates a continuing immoral relation, and performance is even entered upon, yet a plaintiff in the locus poenitentiae accorded may at any time repudiate and discontinue performance. And while the law will afford no relief for the portion of the contract performed, it should, as to the unperformed part thereof, upon a showing of repentance, abandonment and discontinuance of the shameful relation, grant redress.¹⁸

§ 130. Partial Illegality.—Section 1608 of the Civil Code provides:

“If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.”¹⁹⁻²⁰

So if a contract is entire, it is void if any part of the consideration is unlawful. The bad enters into and permeates the whole contract so that none of it can be said to be good, and therefore the subject of an action.¹ Where the illegal sale of liquor enters into a contract as an

17. *Glos v. McBride*, 32 Cal. App. Dec. 370, 191 Pac. 67; *Gridley v. Dorn*, 57 Cal. 978, 40 Am. Rep. 110; *Johnston v. Russell*, 37 Cal. 670. See GAMING.

18. *Glos v. McBride*, 32 Cal. App. Dec. 370, 191 Pac. 67, per Shaw, J.

19-20. *Teachout v. Bogy*, 175 Cal. 481, 166 Pac. 319; *County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 324; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022; *Glos v. McBride*, 32 Cal. App. Dec. 370, 191 Pac. 67; *Mission Brewing Co. v. Rickert*, 39 Cal. App. 668, 179 Pac. 720.

The above rule is also recognized in the dissenting opinion by Wilbur, J. in *Skidmore v. West*, 61 Cal. Dec. 792, 199 Pac. 497, overruling 59 Cal. Dec. 494.

1. *County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 324; *City Carpet etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841 (holding contract divisible); *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Forbes v. McDonald*, 54 Cal. 96; *Prost v. More*, 40 Cal. 348; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Valentine v. Stewart*, 15 Cal. 387.

inseparable part of its consideration, or the terms or conditions of the contract are inseparably connected with illicit traffic, the contract is against public policy and immoral and therefore void.²

But when part of the consideration is legal and part illegal and the transaction is of such a nature that the good part can be separated from that which is bad, the courts will make the distinction and allow the former to stand.³ And where the contract contains two distinct stipulations, for each of which a separate consideration is expressed, and there is no reason to suppose that the expressed consideration for the one formed any part of the consideration for the other, the stipulation supported by the valid consideration will be enforced.⁴ The separation of the good consideration from that which is illegal, where the consideration for a contract is partly illegal, will not be made, however, where the party seeking to enforce the contract is himself the one who made and breached the illegal consideration.⁵

It is the general rule that where a contract, based on a consideration contrary to law, immoral, or opposed to public policy, has been fully and voluntarily executed, if the parties are in *pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other.⁶ In view of this rule it has been declared that section 1608 of the Civil Code must be held to have appli-

2. *Scheeline v. Pezzola*, 29 Cal. App. 266, 155 Pac. 127 (quoting 3 Cyc. 334).

3. *Granger v. Original Empire M. & M. Co.*, 59 Cal. 678; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Jackson v. Shawl*, 29 Cal. 267; *Porter v. Fisher*, 4 Cal. Unrep. 324, 34 Pac. 700. See *supra*, § 105.

4. *McVicker v. McKenzie*, 136 Cal. 656, 69 Pac. 495.

5. *Mission Brewing Co. v. Rickert*, 39 Cal. App. 668, 179 Pac. 720.

6. *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276; *McGregor v. Donnelly*, 67 Cal. 149, 7 Pac. 422; *Patterson v. Donner*, 48 Cal. 369; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Wyman v. Moore*, 103 Cal. 213, 37 Pac. 230; *Swanger v. Mayberry*, 59 Cal. 91; *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94, 89 Pac. 866 (applying rule where both parties to contract regarded it as illegal). See, as to illegal contracts, *supra*, §§ 56-112.

cation only to contracts which are, in part at least, executory.⁷

Recital.

§ 131. **In General.**—Under sections 1614 and 1615 of the Civil Code an agreement need not recite an adequate consideration.⁸ Section 1610 of the Civil Code expressly provides:

“When a consideration is executory, it is not indispensable that the contract should specify its amount or the means of ascertaining it. It may be left to the decision of a third person, or regulated by any specified standard.”⁹

If the consideration is set out, it is not necessary that it should be expressed in any set phrase.¹⁰ Nor is it necessary to repeat the consideration upon the insertion of every several promise or covenant. The mention of it once is sufficient.¹¹ Where a sufficient consideration is expressed, none can be implied.¹² If a contract merely recites that it was executed “for a good and sufficient consideration,” no doubt the presumption would be that the consideration was a valuable one.¹³

Section 1612 of the Civil Code provides as follows:

“Where a contract provides an exclusive method by which its consideration is to be ascertained, which method is on its face impossible of execution, the entire contract is void.”

7. *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276.

8. *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179.

9. *La Grill v. Mallard*, 90 Cal. 373, 27 Pac. 294; *California Annual Conference of M. E. Church v. Seitz*, 74 Cal. 287, 15 Pac. 839 (holding that an agreement that the consideration of a contract

shall be left to the decision of a third person is not in the nature of an agreement to arbitrate).

10. *Otis v. Haseltine*, 27 Cal. 80 (decided prior to adoption of codes).

11. Civil Code, §§ 1614, 1641; *Brickell v. Batchelder*, 62 Cal. 623.

12. *Brickell v. Batchelder*, 62 Cal. 625.

13. *Peterson v. Wagner*, 34 Cal. App. Dec. 823, 198 Pac. 25.

Section 1613 of the Civil Code reads:

“Where a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face, but in fact is, or becomes, impossible of execution, such provision only is void.”

When a contract does not determine the amount of the consideration, but leaves it to the discretion of an interested party, the consideration must, under section 1611 of the Civil Code, be reasonable.¹⁴ Even without recourse to the statute the rule is the same. The person having power to fix the amount may not act fraudulently.¹⁵ Under this provision of the code, if the parties are unable to agree upon the reduction proper to be made, the subject, under proper allegations in the nature of an equitable action, should be submitted to the court in an action to have it determine the reasonable value of the subject of the contract, and such determination will constitute the defendant's liability under the terms of the contract, as though originally written therein.¹⁶ It was declared in an early case that where the consideration of a contract is expressed in writing, although fictitious, it satisfies the statute of frauds.¹⁷

§ 132. Conclusiveness.—The truth of the facts recited in a written instrument, except the recital of a consideration, is conclusively presumed between the parties thereto, or their successors in interest by a subsequent title.¹⁸ But recitals of consideration are not, as a general rule, conclusive.¹⁹ The true consideration, or the want of considera-

14. *La Grill v. Mallard*, 90 Cal. 373, 27 Pac. 294; *Nave v. Taugher*, 33 Cal. App. Dec. 173, 193 Pac. 508.

15. *Foster v. Young*, 172 Cal. 317, 156 Pac. 476; *Nave v. Taugher*, 33 Cal. App. Dec. 173, 193 Pac. 508.

16. *Security Trust & Savings Bank v. Claussen*, 30 Cal. App. Dec. 840, 187 Pac. 142.

17. *Happe v. Stout*, 2 Cal. 460.

18. Code Civ. Proc., § 1962, subd. 2; *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808; *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881.

19. *Fidelity etc. Co. v. Fresno Flume etc. Co.*, 161 Cal. 466, 37 L. R. A. (N. S.) 322, 119 Pac. 646; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119;

tion, may ordinarily be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts which show a valuable consideration,²⁰ if the instrument is not negotiable,¹ and, it would seem, even though the instrument is negotiable, if it is not in the hands of a holder in due course.² It is proper to look beyond the instrument itself in order to determine the real consideration,³ even though a consideration different from that stated in the agreement might thereby be discovered.⁴ The rule is the same whether the named consideration be money or any other article of personal property.⁵

There are, however, well-recognized limitations upon the right of a party to vary by parol evidence the terms of a contract and prove the true consideration. Not infrequently the consideration of a contract takes the form of a condition or covenant which, under the elementary rule in regard to the contradiction of written instruments, cannot be disputed or varied by parol evidence.⁶ Nor,

W. P. Fuller & Co. v. McClure, 32 Cal. App. Dec. 574, 191 Pac. 1027.

20. Royer v. Kelly, 174 Cal. 70, 161 Pac. 1148; Gardner v. Watson, 170 Cal. 570, 150 Pac. 994; National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881; Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025; Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Rhine v. Ellen, 86 Cal. 362; Coles v. Soulsby, 21 Cal. 47; Braselton v. Vokal, 35 Cal. App. Dec. 691, 200 Pac. 670 (citing Civ. Code, §§ 1614, 1615; Code Civ. Proc., § 1962, subd. 2); Stanton v. Weldy, 19 Cal. App. 374, 126 Pac. 175. See *infra*, §§ 137, 138, as to want or failure of consideration.

1. National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881.

2. Civ. Code, § 3109. See NEGOTIABLE INSTRUMENTS.

3. Shepard v. Hunt, 30 Cal. App. Dec. 247, 185 Pac. 677; Field v. Austin, 131 Cal. 379, 63 Pac. 692.

4. Shepard v. Hunt, 30 Cal. App. Dec. 247, 185 Pac. 677.

5. Braselton v. Vokal, 35 Cal. App. Dec. 691, 200 Pac. 670; Stanton v. Weldy, 19 Cal. App. 374, 126 Pac. 175.

6. Harding v. Robinson, 175 Cal. 554; Bradbury v. Higginson, 167 Cal. 553, 140 Pac. 254; Aitchison v. Carruthers, 161 Cal. 7, 118 Pac. 239; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; Pierce v. Edwards, 150 Cal. 650, 89 Pac. 600; McDonald v. Poole, 113 Cal. 437, 45 Pac. 702; Harrison v. McCormick, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830; Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101; W. P. Fuller & Co. v. McClure, 32 Cal. App. Dec. 574, 191 Pac. 1027 (note and mortgage); Gladding,

except on the ground of fraud or some other equitable ground, can the recital of a valuable consideration in a contract be contradicted for the purpose of destroying its legal effect and operation.⁷ And evidence is inadmissible which tends to prove, not that there was no such consideration as is acknowledged by the terms of the contract, but that there was no such contract as that alleged.⁸

But a recital of a consideration is at least *prima facie* evidence that a contract is supported by consideration.⁹

Accounts stated.—Among the cases constituting an apparent exception to the rule that a recital of a consideration is not conclusive are those arising upon accounts stated. It is open to a defendant to repel the legal effect of an account stated by pleading and proof of its procurement through fraud, duress, mistake or other grounds cognizable in equity for the avoidance of an instrument. But it is not open to a defendant to attempt to defeat the legal effect of such a contract by showing a lack of consideration in any other way. Thus, it is not open to a defendant in such a case merely to show that the account stated was based upon a disputed claim of the plaintiff's, which claim subsequently proved to be invalid. Nor would it be open to a defendant to show that the amount justly due was very much less than the amount named in the account stated. All such evidence going to a total or partial lack of consideration is forever debarred by the convention and

McBean & Co. v. Montgomery, 20 Cal. App. 276, 128 Pac. 790; Stanton v. Weldy, 19 Cal. App. 374, 126 Pac. 175; Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948.

7. Gardner v. Watson, 170 Cal. 570, 150 Pac. 994; Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. B. A. 826, 21 Pac. 984; Hendrick v. Crowley,

31 Cal. 471; Coles v. Soulsby, 21 Cal. 47; Braselton v. Vokal, 35 Cal. App. Dec. 691, 200 Pac. 670; Burkett v. Doty, 32 Cal. App. 338, 162 Pac. 1042; Dollar v. International Banking Corp., 13 Cal. App. 338, 109 Pac. 499. See DEEDS.

8. Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529.

9. National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881.

agreement of the parties, for this is of the very essence of an account stated.¹⁰

Pleading and Proof.

§ 133. Instrument in Writing—Consideration Presumed.

At common law a seal was necessary in order to create a presumption that an executory contract was founded upon a valuable consideration,¹¹ except that in the case of negotiable instruments consideration was presumed.¹² By force of the provisions of section 1614 of the Civil Code a contract in writing has at least some of the attributes of an instrument under seal as it was interpreted by those authorities holding that a seal imported a consideration. That section reads: "A written instrument is presumptive evidence of a consideration"—that is to say, a written instrument carries with it the presumption that it was made for a consideration.¹³ This provision is general, and ap-

10. *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994, per Henshaw, J. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 138.

11. *Patterson v. Chapman*, 179 Cal. 203, 2 A. L. R. 1467, 176 Pac. 37. See *infra*, § 135, as to sealed instruments.

12. *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089. See *infra*, § 135, as to abolition of distinction between sealed and unsealed instruments.

13. Civ. Code, § 1614; Code Civ. Proc., § 1963, subd. 21; *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531; *Patterson v. Chapman*, 179 Cal. 203, 2 A. L. R. 1467, 176 Pac. 37; *Anderson v. Wickliffe*, 176 Cal. 120, 172 Pac. 381 (assignment); *McArthur v. Goodwin*, 173 Cal. 499, 160 Pac. 679 (deed); *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994 (account stated); *Thom v. Stewart*, 162 Cal.

413, 122 Pac. 1069 (note); *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257 (sale of mining stock); *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712 (release); *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471 (deed); *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266 (deed); *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899 (note); *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Henke v. Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130; *Malone v. Crescent City Mill etc. Co.*, 77 Cal. 38, 18 Pac. 858; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Goad v. Moulton*, 67 Cal. 536, 8 Pac. 63 (deed); *Winters v. Rush*, 34 Cal. 136 (note); *Rodbaugh v. Kauffman*, 35 Cal. App. Dec. 769, 200 Pac. 747; *Merchants' Nat. Bank v. Carmichael*, 34 Cal. App. Dec. 236, 196 Pac. 76;

plies to all contracts where a different rule is not expressly prescribed.¹⁴ The presumption of consideration has effect as positive evidence in favor of the plaintiff,¹⁵ and the introduction of the contract in evidence establishes a *prima facie* case.¹⁶ Hence it follows that in an action upon an unsealed written instrument as evidence of an obligation to pay money, the common-law rule applicable to sealed instruments prevails, and it is not necessary to make the additional allegation that it was made for a valuable consideration.¹⁷ Where nothing appears to the contrary, the consideration must be deemed satisfactory in every regard.¹⁸ If necessary, it will be assumed that it consisted of something of value not mentioned in the

Flint v. Giguere, 33 Cal. Dec. 742, 195 Pac. 85; *Cole v. Wolfskill*, 32 Cal. App. Dec. 1104, 192 Pac. 549; *Herron Co. v. Flack*, 31 Cal. App. Dec. 631, 189 Pac. 294 (guaranty); *Doyle v. Doyle*, 30 Cal. App. Dec. 497, 186 Pac. 188 (note); *Security etc. Bank of San Diego v. Sietz*, 30 Cal. App. Dec. 28, 185 Pac. 188 (guaranty); *National Bk. of San Mateo v. Whitney*, 40 Cal. App. 276, 180 Pac. 845 (note); *Pacific Portland C. Co. v. Reinecke*, 30 Cal. App. 501, 158 Pac. 1041 (note); *Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650; *Dunlap v. Sunset Lumber Co.*, 26 Cal. App. 131, 146 Pac. 53 (note); *Yellow Jacket etc. Co. v. Holbrook*, 24 Cal. App. 687, 142 Pac. 128 (note); *Estes v. Ballard*, 22 Cal. App. 344, 134 Pac. 361 (note); *Stanton v. Weldy*, 19 Cal. App. 374, 126 Pac. 175 (note); *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926; *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677 (note); *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 123 Pac. 212 (note); *Castor v. Bernstein*, 2 Cal. App. 703, 84 Pac.

244 (release). See DEEDS; NEGOTIABLE INSTRUMENTS.

14. *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189 (declaring that sections 158 and 2235 of the Civil Code, relative respectively to contracts between husband and wife, and between trustee and beneficiary, being special, control in such transactions); *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130.

15. *Moore v. Gould*, 151 Cal. 723, 91 Pac. 616; *Rodabaugh v. Kauffman*, 35 Cal. App. Dec. 769, 200 Pac. 747; *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960.

16. *Creditors' Union v. Lundy*, 16 Cal. App. 567, 117 Pac. 624.

17. *Patterson v. Chapman*, 179 Cal. 203, 2 A. L. R. 1467, 176 Pac. 37; *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926. See *infra*, § 136.

18. *Lewis v. Lewis*, 3 Cal. App. 727, 86 Pac. 994 (deed).

agreement itself, unless the terms of the agreement are such as to exclude or forbid such assumption.¹⁹

§ 134. Presumption Rebuttable.—Although the presumption exists that a contract in writing is supported by consideration, it is not conclusive,²⁰ but is disputable.¹ And the code provides that

“The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.”²

19. *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273.

20. *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531.

1. *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808; *Estate of Kennedy*, 129 Cal. 384, 62 Pac. 64.

2. Civ. Code, § 1615; *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994 (account stated); *Estate of Thomson*, 165 Cal. 290, 131 Pac. 1045 (guaranty); *Thom v. Stewart*, 162 Cal. 413, 122 Pac. 1069 (evidence though conflicting, held to support finding that note in question was not given for alleged illegal consideration); *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257 (sale of mining stock); *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471 (deed); *Main St. etc. Co. v. Los Angeles Trac. Co.*, 129 Cal. 301, 61 Pac. 937 (agreement with reference to right of way); *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 286 (deed); *Rogers v. Schulenberg*, 111 Cal. 281, 43 Pac. 899 (note); *Henke v. Eureka etc. Assn.*, 100 Cal. 429, 34 Pac. 1089 (contract to pay money); *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962 (contract to pay money); *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286 (note); *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965 (contract to pay money);

Metropolitan Loan Assn. v. Esche, 75 Cal. 513, 17 Pac. 675 (surety bond); *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179 (sale of land); *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889 (deed); *Flint v. Giguere*, 33 Cal. App. Dec. 742, 195 Pac. 85 (agreement not to exercise option rights); *Portuguese Amer. Bank v. Schultz*, 33 Cal. App. Dec. 316, 193 Pac. 806 (note); *Cole v. Wolfskill*, 32 Cal. App. Dec. 1104, 192 Pac. 549 (note); *Herron Co. v. Flack*, 31 Cal. App. Dec. 631, 189 Pac. 294 (guaranty); *Doyle v. Doyle*, 30 Cal. App. Dec. 497, 186 Pac. 188 (note); *Edson v. Mancebo*, 37 Cal. App. 22, 173 Pac. 484 (note); *Franck v. Moran*, 36 Cal. App. 32, 171 Pac. 841 (deed); *Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650; *Dunlap v. Sunset Lumber Co.*, 26 Cal. App. 131, 146 Pac. 53 (note); *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926 (sale of corporate stock); *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960 (note); *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677 (note); *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 561, 86 Pac. 820 (order to pay money); *Castor v. Bernstein*, 2 Cal. App. 703, 84 Pac. 244 (release).

But, although the presumption of consideration is one which is subject to be disputed or rebutted by other evidence, it is itself evidence which may be sufficient to satisfy the minds of those who must decide the questions of fact.³ It has been held that the presumption is not subject to be disputed in the case of a stated account, unless fraud, duress, mistake or other grounds cognizable in equity for the avoidance of an instrument be pleaded or made an issue.⁴ And since the Civil Code distinguishes between a mere want of consideration and an illegal consideration,⁵ it is not clear whether section 1615 applies to cases of illegal consideration.⁶ It has been declared that the rule of sections 1614 and 1615 of the Civil Code does not operate against a defendant in an action for specific performance, as a matter of pleading, whatever force it may have as a matter of evidence.⁷ ~~It has been said that these sections and sections 158 and 2235 of the Civil Code are being general whereas sections 158 and 2235 of the Civil Code are special, the latter should control where transactions between husband and wife are concerned.⁸~~

See "Erratum,"
1926 SUPP. 487.

An instruction that the presumption that a consideration passed for the execution of promissory notes, being a disputable one, was the weakest and least satisfactory evidence, while erroneous, is not prejudicial, where the fact was admitted out of which the presumption arose, namely, that the defendant executed the notes.⁹ The jury is the exclusive judge of the weight of the evidence before it; and it is within its province to determine whether the

3. *Estes v. Ballard*, 22 Cal. App. 344, 134 Pac. 361; *People v. Milner*, 122 Cal. 171, 179, 54 Pac. 833. See EVIDENCE.

4. *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994; *Merchants' Nat. Bank of San Francisco v. Carmichael*, 34 Cal. App. Dec. 236, 196 Pac. 76. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 138.

5. Civ. Code, §§ 1607, 1608, 1667.

6. *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286.

7. *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 Pac. 1029.

8. *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189. And see *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130 (holding that section 1614 of the Civil Code is general and applies to all contracts where a different rule is not expressly prescribed).

9. *Rauer's Law & Collection Co. v. Harrell*, 32 Cal. App. 45, 162 Pac. 125.

Text statement for Note 8 is not supported by Dimond case cited. Contentions of counsel seems to have been mistaken for assertion of court concerning Civ. Code, Secs. 1614, 1616, and 158, 2235.
See "Errata" Supp. 18-1-13, p. 252.

defendant's evidence is of sufficient strength to overcome the presumption of consideration for the contract sued upon, and if not satisfied, it is at liberty to disregard such evidence, and to find in favor of the presumption, and its verdict will not be disturbed upon appeal.¹⁰

§ 135. Instrument Under Seal.—Under the common law, an adequate consideration was absolutely necessary to give validity to contracts not under seal; and in case of suits upon them, the consideration was required to be alleged and proved. It was not so with sealed instruments; they imported a consideration which was presumed to be adequate,¹¹ if there was nothing in their terms which negatived this conclusion.¹² And a party was not, at common law, permitted to plead a want of consideration as a defense to an action upon a sealed instrument—the presumption of the existence of a consideration being absolute and conclusive.¹³ Nor was a special averment of consideration necessary.¹⁴ But where a want of consideration for the execution of the instrument was apparent from the averments of the complaint, the fact could be taken advantage of by demurrer.¹⁵ By an early statute the rule was modified so far as to permit the want of consideration to be

10. *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677 (note).

11. *Patterson v. Chapman*, 179 Cal. 203, 2 A. L. R. 1467, 176 Pac. 37; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179.

Bearing upon this phase of contract law a well-known writer has observed in his recent work: "At common law a sealed promise or covenant was binding by its own force. It is often said that such instruments are 'presumed' to have consideration or 'import' consideration. This mode of statement, though antedating Lord Coke's time, is absurd historically, since sealed

instruments were binding centuries before the development of simple contracts and the law of consideration." *Williston on Contracts*, § 109; see, also, § 217 et seq. of the same work.

12. *Mulford v. Estudillo*, 17 Cal. 618.

13. *McCarty v. Beach*, 10 Cal. 461.

14. *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089; *Wills v. Kempt*, 17 Cal. 99; *McCarty v. Beach*, 10 Cal. 462.

15. *McCarty v. Beach*, 10 Cal. 461.

pleaded. Such statute did not, however, alter the presumption of consideration. Its language was "it shall be lawful" for the defendant "to plead such want of consideration."¹⁶

Although section 1629 of the Civil Code provides that "All distinctions between sealed and unsealed instruments are abolished," this provision cannot, of course, in view of section 1614 of the Civil Code, be construed to do away with the presumption that a sealed instrument is supported by a sufficient consideration, the sealed instrument being a written agreement. It was designed to make sealed as well as unsealed instruments open to defense for want of consideration.¹⁷

§ 136. Pleading Consideration.—The common-law rules of pleading required the declaration on a simple contract to state the consideration for the defendant's promise,¹⁸ except where the consideration for the promise was implied, as in cases of bills of exchange and promissory notes.¹⁹ In declaring on a specialty or sealed instrument the rule was that no consideration need be alleged, except where the performance of the consideration was a condition precedent, the reason of the rule being that an instrument under the hand and seal of the party sought to be charged imported a consideration.²⁰

Under the Civil Code every written contract imports a consideration.¹ And if the contract is set forth in full in the pleading, it is not necessary to allege a consideration,²

16. *Comstock v. Breed*, 12 Cal. 286; *McCarty v. Beach*, 10 Cal. 461.

17. *Tracy v. Alvord*, 113 Cal. 654, 50 Pac. 757.

18. *Moore v. Waddle*, 34 Cal. 145.

19. *Moore v. Waddle*, 34 Cal. 145.

20. *Moore v. Waddle*, 34 Cal. 145; *Wills v. Kempt*, 17 Cal. 98; *McCarty v. Beach*, 10 Cal. 461.

1. See *supra*, § 133.

2. *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Younglove v. Cunningham*, 5 Cal. Unrep. 281, 43 Pac. 755. See *infra*, §§ 137, 138, as to want or failure of consideration. See *supra*, §§ 134-135, as to presumption of consideration.

and such an averment is mere surplusage.³ As the necessity of pleading a consideration is obviated by the fact that the contract is in writing, and not by the mode of pleading it, it is not necessary that the instrument should be set out in *haec verba*.⁴ It is also true that under the code system of pleading, where only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or the promise, when they are implied as a legal conclusion from the facts which are alleged. In an action on the common counts for goods sold and delivered, and for services rendered, the consideration is implied and it is not necessary to allege it specifically in the complaint.⁵

But when an action is upon a contract not in writing,⁶ or where the contract being in writing, the complaint fails to set it out,⁷ the consideration must be alleged. An averment in the complaint in such an action that the plaintiff had always been ready and willing to receive the goods contracted to be sold, "and to pay for them at the price called for by said contract and in accordance with the terms thereof," is a sufficient allegation of consideration, in the absence of either a special or general demurrer.⁸ A complaint in an action upon a bond given to procure the release of an attachment must allege the consideration for which the undertaking was executed. A mere reference to the condition of the bond is not sufficient.⁹

3. *Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650.

4. *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089. See PLEADING.

5. *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761; *Krieger v. Feeny*, 14 Cal. App. 538, 112 Pac. 901; *Preston v. Central Cal. etc. In. Co.*, 11 Cal. App. 190, 104 Pac. 462; *Aydelotte v. Billing*, 8 Cal. App. 673, 97 Pac. 698. See SALES; WORK AND LABOR.

6. *Acheson v. Western Union Tel. Co.*, 96 Cal. 641, 31 Pac. 533; *Mills v. Geo. A. Moore & Co.*, 39 Cal. App. 94, 178 Pac. 304 (holding allegations on subject of consideration sufficient).

7. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454.

8. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454.

9. *Coburn v. Pearson*, 57 Cal. 306. See ATTACHMENT, vol. 3, pp. 509, 528.

§ 137. **Want or Failure of Consideration.**—From the fact that the law requires a consideration for a contract, it follows that a promisor may show want or failure of consideration, in defense to an action upon the contract,¹⁰ (except in the case of a negotiable instrument in the hands of a bona fide holder for value);¹¹ or in support of an action to recover benefits bestowed upon the promisee.¹² And the want or failure of the consideration may be shown by parol evidence.¹³ Section 1625 of the Civil Code, in reference to the merger and superseding of oral negotiations by written instruments, does not change the law as to parol evidence of the consideration of such instruments.¹⁴ But failure of consideration is not in itself sufficient to justify a court in finding fraud as matter of

10. *Parker v. Funk*, 61 Cal. Dec. 404, 197 Pac. 83 (holding defense available against assignee of other party); *Estate of Land*, 178 Cal. 296, 173 Pac. 387; *Lundeen v. Ottis*, 164 Cal. 183, 128 Pac. 335; *Russ etc. Co. v. Muscupiabe etc. Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737; *Happe v. Stout*, 2 Cal. 460; *Edson v. Mancebo*, 37 Cal. App. 22, 173 Pac. 484; *McManus v. Patch*, 20 Cal. App. 479, 129 Pac. 613.

With reference to partial failure of title to property sold, the rule varies according to whether the property concerned is real or personal. In an action for the price of land sold and conveyed by a deed with the usual covenants of title, the defendant cannot, in the absence of fraud, avail himself, in defense, of a partial failure of title by way of recoupment or in reduction of damages, but his only remedy is on the covenants of the deed. In suits to recover the price

of personal property sold, it is well settled that a partial want or failure of the consideration, or a breach of the warranty of title or quality, may be shown in defense, in reduction of damages. This rule is adopted to avoid circuity of action, because all the rights of the parties growing out of the same transaction can be justly and conveniently settled in one suit. *Gaffey v. Walk*, 31 Cal. App. Dec. 643, 189 Pac. 300 (quoting from *Bovley v. Holway*, 124 Mass. 395). See *supra*, § 115, as to necessity for consideration.

11. See NEGOTIABLE INSTRUMENTS.

12. *Richter v. Union Land etc. Co.*, 129 Cal. 367, 62 Pac. 39; *Smith v. Bach*, 35 Cal. App. Dec. 331, 199 Pac. 1106 (illegal contract). See ASSUMPSIT, vol. 3, p. 372.

13. *Braserton v. Vokal*, 35 Cal. App. Dec. 691, 200 Pac. 670 (citing Civ. Code, §§ 1614, 1615; Code Civ. Proc., § 1962, subd. 2).

14. *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022.

law.¹⁵ And where an adequate motive for making a deed is apparent, want of consideration does not necessarily militate against the bona fides of the transaction.¹⁶

There is a wide difference between showing an utter lack of consideration and some other consideration than that named in the agreement. In the latter case, a consideration is admitted, and a different one is sought to be shown, while in the former case, the purpose is to show the nonexistence of any consideration. It is said that, on principle, no reason appears for allowing proof of no consideration where money is the consideration named, and denying it where some article of personal property is named as the consideration. If the promisor received nothing in either case, he may show the fact in defense.¹⁷ Failure of consideration does not, of course, mean the nonpayment of the purchase money according to the agreement, the liability to pay, though default be made, being a consideration. What is meant is the failure of the contract by the occurrence of something which either determines the existence of the subject matter or materially affects it. If the subject matter be not essentially affected, the party injured will not be entitled to be discharged from the contract, though there may be a claim for compensation.¹⁸

In all executory contracts the several obligations of the parties constitute to each, reciprocally, the consideration; and failure of a party to perform constitutes a failure of consideration,—either partial or total, as the case may be, within the meaning of section 1689 of the Civil Code, and furnishes a ground for rescission of the contract.¹⁹ In the case of an executed contract, as for ex-

15. *McFadden v. Mitchell*, 54 Cal. 628; *Jamison v. King*, 50 Cal. 133.

16. *Cook v. Cockins*, 117 Cal. 140, 48 Pac. 1025. See *DEEDS*.

17. *Stanton v. Weldy*, 19 Cal. App. 374, 126 Pac. 175.

18. *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382.

19. *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004; *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39; *Sterling v. Gregory*, 149

ample a deed of land of which the consideration is a promise to pay the purchase money, this is not always true; because in such cases, or generally in such cases, "the vendor has waived actual performance upon the part of the vendee, relying upon his mere promise to perform."²⁰

But it does not follow that because a technical rescission has not been made, and cannot be made, that a defendant cannot avail himself of the defense of failure or want of consideration. "Practically, there is no difference in the effect upon the contract between the successful defense of a plea of want or total failure of consideration, and the successful termination of an action to rescind it. In either case, the contract is rendered incapable of enforcement, the judgment being a bar to any future action, so far at least as parties to the action, or those concluded by it, are concerned. Where the failure of consideration is total, as where nothing of value has been received by the defendant under it and the plaintiff cannot perform it, no notice of rescission is required, but the defendant may plead want or failure of consideration."²¹ The delivery of notes in settlement, upon the completion of a contract of which time was not made the essence, precludes any plea of failure or partial failure of the consideration on account of delay.²²

§ 138. Pleading Want or Failure.—The defense of want of consideration for the execution of a written instrument is new matter, which must be specially pleaded, and it seems to be the rule that a general averment that the con-

Cal. 117, 85 Pac. 305; Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280; Torrey v. Shea, 29 Cal. App. 313, 155 Pac. 820; Billings v. Everett, 52 Cal. 661. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 785.

20. Richter v. Union Land etc. Co., 129 Cal. 367, 62 Pac. 39; Law-

rence v. Gayetty, 78 Cal. 126, 15 Am. St. Rep. 29, 20 Pac. 382. See DEEDS.

1. Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co., 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995, per Haynes, C.

2. Witmer Bros. Co. v. Weid, 108 Cal. 569, 41 Pac. 491.

tract sued on was executed without any consideration whatever is but an allegation of a conclusion of law.³ The rule is that he who would assert failure or partial failure of consideration for contract in writing must allege such failure or he will not be permitted to present evidence upon that point in the case.⁴ A naked denial of the existence and character of the particular consideration alleged in the plaintiff's complaint is not sufficient.⁵ But a general allegation of want of consideration in the answer, taken in connection with an averment that the note sued on was executed and delivered to the payee as a result of duress, sufficiently pleads a defense, in the absence of a special demurrer. In such a case, even if an allegation of want of consideration be considered as a conclusion of law, an objection made after the trial of the case upon the merits will not be considered upon an appeal supported only by a record which does not show that the objection was interposed by demurrer or otherwise in the court below.⁶ An answer pleading a want of consideration for a supplemental agreement which imposes a new and onerous burden on the defendant, and does not disclose any consideration therefor on its face, presents a sufficient defense to an action based thereon.⁷ When want of consideration is pleaded there is no estoppel, whatever the terms of the instrument may be, which can interfere with that defense. The idea of such estoppel, it has been said, comes from the days of sealed instruments.⁸

3. *Pastene v. Pardini*, 135 Cal. 431, 67 Pac. 681; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Winters v. Rush*, 34 Cal. 136; *Gushee v. Leavitt*, 5 Cal. 160, 63 Am. Dec. 116; *Happe v. Stout*, 2 Cal. 460; *Flint v. Giguere*, 33 Cal. App. Dec. 742, 195 Pac. 85; *Biegel v. Wollenshlager*, 33 Cal. App. Dec. 171, 193 Pac. 160; *Rivera v. Cappa*, 29 Cal. App. 496, 156 Pac. 1016, 1017; *Yellow Jacket etc. Co. v. Holbrook*, 24 Cal. App. 687, 142 Pac. 128.

4. *Portuguese Amer. Bank v. Schultz*, 33 Cal. App. Dec. 316, 193 Pac. 806.

5. *Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650.

6. *Rivera v. Cappa*, 29 Cal. App. 496, 156 Pac. 1016, 1017.

7. *Main St. etc. R. R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937.

8. *Estate of Kennedy*, 129 Cal. 384, 62 Pac. 64. See *supra*, § 135, as to sealed instruments.

Want of consideration may be shown, when pleaded, even though due execution and genuineness of an instrument be not denied.⁹ And it is elementary that want of consideration for a writing, when properly pleaded, may be shown by parol proof.¹⁰

It has been held that in an action to enforce an agreement for the payment of money and for the sale of a note and mortgage pledged to secure the same, in which the answer denied that there was any consideration whatever for the agreement, the trial court, at the close of the evidence, may permit the plaintiff to amend his complaint so as to conform to the proofs with respect to such consideration, without giving the defendant an opportunity further to answer the complaint as amended.¹¹

VI. MUTUALITY.

§ 139. Obligation Generally.—It has been declared to be a well-established principle, that, “to be obligatory on either party, a contract must be mutual and reciprocal in its obligations.”¹² It is apparent, though, that this rule has application only when the contract is based upon the mutual promises of the parties.¹³ Where a contract imposes no definite obligation on one party to perform, it lacks mutuality of obligation, or of consideration, which means the same thing.¹⁴ The acceptor, by accepting, must

9. *Myers v. Sierra Valley etc.* Cal. 245, 134 Am. St. Rep. 124, 28 Assn., 122 Cal. 669, 55 Pac. 689; *Brooks v. Johnson*, 112 Cal. 569, 55 Pac. 423; *Bradley v. Bush*, 11 Cal. App. 287, 104 Pac. 845.

10. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159; *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 761, 118 Pac. 92. See *supra*, § 132.

11. *Sharp v. Pitman*, 166 Cal. 501, 137 Pac. 234.

12. *Harper v. Goldschmidt*, 156

Cal. 245, 134 Am. St. Rep. 124, 28 L. B. A. (N. S.) 689, 104 Pac. 451; *Doe v. Culverwell*, 35 Cal. 291.

13. See *infra*, § 140, as to unilateral contracts.

14. *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177; *Stanton v. Singleton*, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146; *Rourke v. McLaughlin*, 38 Cal. 196; *Hamlin v. Barnhart*, 26 Cal. App. 632, 147 Pac. 1188.

bind himself.¹⁵ He does not do so when he merely agrees to purchase such goods as he may "desire" or "want," for a particular purpose or during a certain period of time.¹⁶ But when a vendee agrees to buy what he needs of a certain product during a stated time, and the vendor absolutely promises to sell, a binding contract is made. Such a contract imposes upon the vendee the duty of buying what he requires from the vendor and upon the latter the obligation to sell to him at the contract price.¹⁷ And generally a contract by which one party agrees to use his "best endeavors" to promote the sale of a commodity produced by the other party and to purchase from the producer all of such commodity as he may need and binding the producer absolutely to sell is valid and not wanting in mutuality.¹⁸

A contract for the exchange of real properties by which one of the parties agrees to the exchange in case he can borrow a certain sum on certain property for which purpose he is given a certain number of days, is lacking in mutuality of consideration, as this party's performance is made conditional upon his being able to borrow the money, and therefore the other party has the right to withdraw his offer to exchange at any time before acceptance.¹⁹

15. *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 117 Pac. 934 (holding contract binding upon both parties and not lacking in mutuality). And see *Oldershaw v. Kingsbaker*, 35 Cal. App. Dec. 749, 200 Pac. 729 (holding that a contract to take the entire output of a hothouse tomato plant for a given period at a specified price was not void for want of mutuality). See, also, notes, 1 A. L. R. 1392, 9 A. L. R. 276, as to validity of contract for sale of season's output.

16. *Schalk Chemical Co. v. R. W. Pridham Co.*, 32 Cal. App. Dec. 952,

192 Pac. 196; *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 117 Pac. 934. And see note, 14 A. L. R. 1300.

17. *Marin Water etc. Co. v. Town of Sausalito*, 168 Cal. 587, 143 Pac. 767; *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 117 Pac. 934. And see note, 14 A. L. R. 1300.

18. *Marin Water etc. Co. v. Town of Sausalito*, 168 Cal. 587, 143 Pac. 767.

19. *Hamlin v. Barnhart*, 26 Cal. App. 632, 147 Pac. 1188. See *EXCHANGE OF PROPERTY*.

But a contract to pay purchase money absolutely is not void for want of mutuality or consideration where a vendor claiming title to land, which had not been perfected by patent, agreed to convey when a patent should be obtained, and to permit the purchaser to enter into possession at once, and to repay the purchase money without interest in the event of an ultimate failure to obtain a patent.²⁰ It has been held that it is not necessary to mutuality that a contract to supply gas to a hotel should name a definite period of time for its continuance; that it is unlike the case of an offer to sell personal property at a stated price where the buyer does not agree to purchase or bind himself at all.¹ Where a party to a contract is excused from absolute performance because of an emergency, the contract is not thereby void for lack of mutuality.² By bringing an action a party may put himself under the obligation of the contract. The obligation being binding, he creates mutuality of remedy by submitting himself to the jurisdiction of the court.³

§ 140. Unilateral Contract.—As a unilateral contract is not founded on mutual promises, the doctrine of mutuality of obligation is inapplicable to such a contract. Accordingly, where one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for, upon the performance of the condition by the promisee, the offer is accepted, the promise becomes binding and the contract is clothed with a valid consideration.⁴ Agreements uni-

20. *Southern Pac. R. R. Co. v. of Sausalito*, 168 Cal. 587, 143 Pac. 767.
Allen, 112 Cal. 455, 44 Pac. 796.
 See VENDOR AND PURCHASER.

1. *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329.

3. *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329. See *infra*, § 141, as to mutuality of remedy generally.

4. *Jones v. Snow*, 64 Cal. 456, 2 Pac. 28; *Nevada Bank v. Stein-*

lateral at first are sustained upon execution of the optional consideration.⁵ This is true of a contract to deed a right of way and certain specified land for a railway, after it has been built and in operation on the right of way within a time and in a manner specified. Such contracts have become familiar as stimulants to the construction of railroads and other public works, the inducement to the promisor, whether expressed or presumed, being the probable enhancement of the value of property by construction. That these promises or mere offers, unilateral at first, may be enforced when mutuality is secured by an executed consideration, is sustained upon well-recognized principles. The consideration takes its strongest form when it is executed. In such a case, the completion of the work is an executed consideration, sufficient to give mutuality to the contract.⁶

An option, in the form of a unilateral contract, supported by a consideration, furnishes another illustration of an agreement which is valid notwithstanding the lack of mutuality. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it. Nor will the refusal of the vendor to accept the purchase money destroy the mutuality, though the vendee may thereupon withdraw his election.⁷

§ 141. Mutuality of Remedy.—The principle that contracts must be mutual, that they must bind both parties

metz, 64 Cal. 301, 30 Pac. 970 (agreement by county to aid in construction of railroad); Mathewson v. Fitch, 22 Cal. 86 (agreement to pay a certain sum to plaintiff's assignors when they should secure a final decree in certain litigation).

5. Marin Water etc. Co. v. Town of Sausalito, 168 Cal. 587, 143 Pac. 767 (contract for water supply).

6. Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Spires v. Urbahn, 124 Cal. 111, 56 Pac. 794.

7. Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149 (real estate). See Levy v. Lyon, 153 Cal. 213, 94 Pac. 881, to the effect that an option unsupported by consideration is a mere unilateral agreement which becomes mutual only upon a proper performance by the optionee of his election. See to similar effect, Hay v. Mason, 141 Cal. 722, 75 Pac. 300. See, also, as to options, supra, §§ 27, 28, 30.

or neither, does not mean that in every case each party must have the same remedy for a breach by the other.⁸ Where both are bound by the agreement, either may pursue such remedies for its enforcement as are open to him and these need not be identical.⁹ Nor does the principle mean that when a contract is written each party must sign it. The engagement of one may be in writing, and that of the other rest in parol, even when the contract is wholly executory.¹⁰ However, it is declared by the code that

“Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.”¹¹

VII. DEFINITENESS OR CERTAINTY.

§ 142. **In General.**—An express contract need not be in writing, but whether oral or written there must be certainty and definiteness as to the language or words used in expressing the terms of the contract and in showing a meeting of the minds of the parties as to the terms.¹² It is settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject matter and parties.¹³ It has

8. *Cavanaugh v. Caselman*, 88 Cal. 543, 26 Pac. 515; *Reed v. Hickey*, 13 Cal. App. 136, 109 Pac. 38.

9. *Reed v. Hickey*, 13 Cal. App. 136, 109 Pac. 38.

10. *Cavanaugh v. Caselman*, 88 Cal. 543, 26 Pac. 515.

11. Civ. Code, § 3386. See **SPECIFIC PERFORMANCE**.

12. *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054; *Wineburgh v. Gay*, 27 Cal. App. 603, 150 Pac. 1003 (holding memorandum

signed by defendant too uncertain to form basis for that meeting of minds or mutual assent which is necessary to constitute a contract). As to assent by meeting of minds of parties, see *supra*, § 24.

13. *Talmadge v. Arrowhead R. Co.*, 101 Cal. 367, 35 Pac. 1000; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Burnett v. Kullak*, 76 Cal. 535, 18 Pac. 401 (holding that when a contract of sale provides for payment of part of the pur-

been said that there is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should certainly be known when a man is bound and when he is not.¹⁴ A contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained; an indefinite contract cannot be enforced because the courts cannot know to what the parties agreed. A meaning and intent of the parties must be placed beyond the bounds of mere conjecture.¹⁵

Though a contract having a single object, which is so vaguely expressed as to be wholly unascertainable, is wholly void,¹⁶ yet a contract assailed for uncertainty must be interpreted so as to make it effective, if possible, without violating the intention of the parties. The words used are to be understood in their ordinary meaning. Uncertain terms are to be interpreted in the sense in which the promisor believed that the promisee understood the promise when made.¹⁷ The contract may also be explained by reference to the circumstances under which it was made and the matter to which it relates.¹⁸ As to the

chase money on mortgage, without specifying the terms of the mortgage, and the terms thereof are not made certain by reference in the contract, or by averment in the complaint, the agreement is too indefinite and uncertain to support a judgment for specific performance); Los Angeles Immigration etc. Assn. v. Phillips, 56 Cal. 539; Wineburgh v. Gay, 27 Cal. App. 603, 150 Pac. 1003; Fabian v. Lammers, 3 Cal. App. 109, 84 Pac. 432. See *infra*, § 144, as to certainty as to price and quantity. See *supra*, § 20, as to identification of parties.

14. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 69 Am. St.

Rep. 17, 43 L. R. A. 199, 55 Pac. 713.

15. *Reymond v. Laboudigue*, 148 Cal. 691, 84 Pac. 189 (quoting 26 Am. & Eng. Ency. of Law, 2d ed., p. 33).

16. Civ. Code, § 1598; *Caldwell v. Development Co.*, 36 Cal. App. Dec. 574 (but holding instrument containing several objects not wholly void for uncertainty).

17. *Sutliff v. Seidenberg, Stiefel & Co.*, 132 Cal. 63, 64 Pac. 131, 469 (citing Civ. Code, §§ 1598, 1643, 1644, 1649). See *infra*, § 161 et seq., as to construction of contracts generally.

18. Civ. Code, § 1647; *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885

parties or the subject matter extrinsic evidence may and must be received and used to make them certain, if necessary for that purpose.¹⁹ But that parol evidence is inadmissible for the purpose of altering the legal operation of an instrument, by evidence of an intention to an effect which is not expressed in the instrument, is, of course, elementary.²⁰

Where a contract consisted of a lease and an option allowing the lessees to purchase it was held that repugnant clauses with reference to the removal of improvements in case the option was not exercised did not make the contract uncertain as an agreement to sell.¹ And, an agreement by the owner of a lot of land to convey it to his brother, in consideration of the latter's erecting on the land and furnishing a home for the use of their parents, during their lives, is sufficiently certain and definite to admit of its specific enforcement.²

The acts of practical construction placed upon a contract by the parties thereto are binding, and may be resorted to to relieve it from doubt and uncertainty. Thus an agreement of a water company to supply water to certain land for irrigation purposes for a specified sum is sufficiently certain when the water to be sold is identified by describing it as water from a named river, to be carried through the canal of the company, the company having but one canal leading from that river, although the lateral by which it is to be conducted to the land is not described except by the statement that the company is to deliver the water on the land by means of such head-gates, weirs

(correcting indefinite description of land by extrinsic evidence); *Sutliff v. Seidenberg, Stiefel & Co.*, 132 Cal. 63, 64 Pac. 131, 469; *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344 (reforming contract for exchange of real property on ground of mutual mistake of parties). See *infra*, § 180.

19. *Wilson v. Samuels*, 100 Cal. 514, 35 Pac. 148, 559.

20. *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689, 928. See EVIDENCE.

1. *Swanston v. Clark*, 153 Cal. 300, 95 Pac. 1117.

2. *Magee v. Magee*, 174 Cal. 276, 162 Pac. 1023. See SPECIFIC PERFORMANCE.

and devices as it shall construct for that purpose, the uncertainty in this respect being removed when the lateral ditch is constructed.³

§ 143. Time.—The effect of the omission from an agreement of the time of its duration is generally determined by a construction of the contract.⁴ Sometimes indefiniteness as to duration is treated as an obstacle to the enforcement of the contract. If the purported or claimed consideration be personal services, the agreement for such services must be definite and certain not only with reference to their nature and character, but also with reference to the time of their continuance. An agreement whereby a woman promises to make a will in favor of her nephew in consideration of his becoming an inmate of her home, assuming the obligations of a son, and assisting her in domestic and business affairs, is indefinite in an essential particular if silent as to the length of time for which such services are to be continued.⁵ So also a contract is uncertain when the termination of the period of service of a person is altogether a matter of his own option.⁶ The effect of the failure to mention the time for performance presents less difficulty. In such case a reasonable time is implied by law. Therefore the absence of a stipulation to that effect does not render the contract void for uncertainty.⁷

§ 144. Price and Quantity.—It is elementary that a contract of sale must be certain as to the thing sold and designate the price to be paid for it,⁸ and it is clear that

3. *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 15 L. R. A. (N. S.) 359, 93 Pac. 858. And see *infra*, § 184.

4. 6 *Ruling Case Law*, p. 646.

5. *Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109, 1111 (citing *Owens v. McNally*, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710, and *McCabe v. Healey*, 138 Cal. 81, 70 Pac. 1008).

6. *Kurtz v. De Johnson*, 42 Cal. App. 221, 183 Pac. 588. See *MASTER AND SERVANT*.

7. See *infra*, § 207.

8. Civ. Code, § 1729; *Breckenridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Jule Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 117 Pac. 936. See *SALES; VENDOR AND PURCHASER*.

if an executory contract of sale is uncertain and incapable of being made certain in the essential particular of the price to be paid for the thing sold, neither of the parties can be held to its terms nor recover damages for its breach.⁹ It is true, generally, that where no price is fixed in a contract for the sale of a commodity, the law, upon a delivery and acceptance of the thing sold, implies an understanding that a reasonable price is to be paid, and in such a case the contract will be deemed to be executed. In other words, in the absence of a fixed price, or an agreement as to the mode of ascertaining the value of the goods sold and delivered, the purchaser will be held liable for their reasonable value. Where, however, the price of the commodity called for but not delivered is to be subsequently fixed by the valuation of others or by the agreement of the parties, the contract is incomplete, and nonenforceable, until the price is so fixed or agreed upon.¹⁰ A provision in a written agreement between an insurance company and its general agent, whereby the company agreed to pay him, in addition to other compensation for his services, "a contingent commission of five per cent," without stating upon what the contingency depends, or upon what sum the "five per cent" is to be calculated, is void for uncertainty.¹¹

9. *Reymond v. Labondigue*, 148 Cal. 691, 84 Pac. 189 (uncertainty as to price of land); *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367, 35 Pac. 1000 (sale of property of reservoir company); *Breckenridge v. Crocker*, 78 Cal. 529, 21 Pac. 179 (sale of real estate); *Los Angeles Immigration etc. Assn. v. Phillips*, 56 Cal. 539 (sale of land); *Jule Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 117 Pac. 936 (sale of goods).

10. *Jule Levy & Bro. v. A. Mautz*

& Co., 16 Cal. App. 666, 117 Pac. 936. See SALES.

11. *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689, 928 (holding same was true of a further provision in such agreement, whereby the company agreed "to share the expenses of the general agent's office in San Francisco pro rata" with another insurance company, "for clerk's salaries, rent and office furniture and fixtures, to the maximum amount of \$3,200 per year, as shown by the ledger of the general agent").

Whether a contract under which the quantity of the subject matter is not stated specifically is enforceable seems to depend on whether such quantity is ascertainable. The maximum amount being fixed by the contract, the uncertainty as to the quantity and quality of particular kinds of commodities which might be chosen is not the kind of uncertainty which renders an executory contract unenforceable. The agreement is relieved of uncertainty when the choice is exercised. Such contracts come within the maxim embodied in section 3538 of the Civil Code, that "That is certain which can be made certain."¹² A covenant "to let the lessor have what land he and his brothers might want for cultivation," it was held, could not be enforced for uncertainty.¹³ But a contract for a carload of iron is enforceable, notwithstanding the parties in making the contract did not state how much iron should constitute a carload and it did not attempt to provide what should be either the minimum or maximum amount of iron in such carload.¹⁴ A contract to deliver about fifty-three thousand pounds of wool does not require the delivery of that exact number of pounds, but the vendor has a reasonable latitude allowed him as to the number of pounds he shall deliver.¹⁵

§ 145. Degree of Uncertainty as Affecting Remedy.—

A greater amount or degree of certainty, it has been said, is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages. An action at law is founded upon a mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. But suit in equity is wholly

12. *Mebins & Drewcher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917.

13. *Chipman v. Emeric*, 5 Cal. 49, 63 Am. Dec. 80.

14. *Dutwiler v. Klunk*, 37 Cal. App. 796, 174 Pac. 919.

15. *Polhemus v. Heiman*, 45 Cal. 573.

an affirmative proceeding; its object is to procure performance by the defendant, and this demands a clear, definite and precise understanding of all the terms which must be exactly ascertained before the performance can be enforced.¹⁶ But the fact must not be lost sight of that a contract may be too hopelessly uncertain to base an actionable breach upon.¹⁷

§ 146. Specification of Public Improvement.—It is a general principle applying to the letting of contracts for public work that the plans and specifications must be sufficiently certain and definite, upon all the details which materially affect the cost of the work, to apprise bidders of all the essential and substantial parts of the work and to enable them to know with reasonable accuracy the outlay they will have to make in performing.¹⁸ This is thoroughly established in the case of public improvements of streets, where the cost is raised by assessment upon the property within the district specially benefited thereby.¹⁹ There is a well-recognized exception to this

16. *Durst v. Jolly*, 35 Cal. App. 184, 169 Pac. 449. See SPECIFIC PERFORMANCE.

17. *Nelson v. F. & A. Levy & Co.*, 26 Cal. App. 367, 146 Pac. 1058.

18. *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933. See *supra*, § 1, for references to articles discussing contracts for the construction of public works and improvements.

19. *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933; *Piedmont P. Co. v. Allman*, 136 Cal. 88, 68 Pac. 493 (character of gutters not specified); *California Imp. Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802 (contract delegating to superintendent of streets power to determine amount of fine material to be used);

Grant v. Barber, 135 Cal. 188, 67 Pac. 127 (uncertainty as to places and materials of culverts); *Stansbury v. White*, 121 Cal. 433, 53 Pac. 940 (contract leaving amount and character of work to discretion of street superintendent); *Chase v. Scheerer*, 136 Cal. 248, 66 Pac. 768 (contract unlawfully delegating power to street superintendent to increase or lessen expense of work); *Perine Contracting etc. Co. v. Pasadena*, 116 Cal. 6, 47 Pac. 777 (contract giving street superintendent power to increase expense of work to indefinite extent); *Warren v. Chandos*, 115 Cal. 382, 47 Pac. 132 (change of grade by supervisors not provided for in contract). See MUNICIPAL CORPORATIONS.

rule in the case of details of construction which do not appear and cannot with reasonable diligence and cost be ascertained in advance, or which will be disclosed only by the doing of the work, or which any contingency that reasonable care and consideration would not foresee. Such things may occur in every work of any considerable magnitude, and they must be left to be adjusted in accordance with general provisions of the contract, or by the discretion of the person or board supervising its performance.²⁰

VIII. FORMAL REQUISITES.

§ 147. **Form as Element.**—The legislature may prescribe the form in which contracts shall be executed, in order that they may be valid or binding.¹ And unless an attempted provision in that behalf is manifestly without foundation in reason, it cannot be nullified by the courts.² The fact that such a regulation is contained in the part of the statute law relating to a particular subject does not warrant a construction confining its operation to those cases alone where that particular subject matter is involved. For example, although a code provision affecting the formal requisites of building contracts is found in the title relating to liens and the manner of their enforcement,

20. *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933, per Shaw, J. (holding under the "Good Roads Law" of 1907, it was not intended that the preliminary report of the highway commissioners to the supervisors should go into detail, or that a slight or reasonable departure therefrom in the final specifications for the doing of the work not destructive of the general plan proposed, should render the contract void). Examples of such details, and of lawful provisions for their determination, were considered in *McCaleb v. Dreyfus*, 156 Cal. 204,

103 Pac. 924; *Haughawout v. Raymond*, 148 Cal. 311, 83 Pac. 53; *Chase v. Scheerer*, 136 Cal. 248, 66 Pac. 768; *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492; *Banas v. Smith*, 133 Cal. 102, 65 Pac. 309; *Haughawout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078.

1. *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113; *Stimson Mill Co. v. Braun*, 136 Cal. 122, 88 Am. St. Rep. 116, 57 L. R. A. 726, 68 Pac. 481. See CONSTITUTIONAL LAW, vol. 5, p. 737.

2. *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113.

its application is not limited to cases concerning the rights of lien claimants, but extends also to actions between the parties.³ It, being a part of the general plan devised for the protection of possible lien claimants, was, it has been said, very properly placed in the title of the Code of Civil Procedure relating to such matters.⁴ Where the court finds that a contract was entered into and that it was performed, it cannot be presumed upon appeal, without proof, that it was void for want of filing, or for any other rea-

3. *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113, construing section 1183 of the Code of Civil Procedure as it stood prior to its amendment in 1911, requiring that building contracts when "the amount agreed to be paid thereunder exceeds one thousand dollars," be in writing and the contract or a memorandum thereof be filed with the county recorder. In this case the court said: "The decisions of this court are not opposed to our conclusion as to the effect of this provision, but, on the contrary, support it. . . . In *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391, the earlier decisions were reviewed, and it was concluded that the true rule in such a case is, not that the contract is valid and binding between the parties in the sense that either party may enforce its terms as against the other, for the language of the statute expressly prohibits any action looking to that end, but simply that, as it could not have been intended to give to the contractor in such a case greater rights as against the owner than would have been his had he complied with the law in the matter of filing the contract for record, in any action brought by him for the reasonable value of the labor and materials furnished, the

only action remaining to him in view of the statutory provision, the contract must remain, to use the language of this court, 'not the basis of his recovery, but the measure and test of his right to recover.'"

But see *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767 (decided under section 1183½ of the Code of Civil Procedure as it stood prior to its repeal in 1903, the court holding that the requirement of the section that specifications of a building contract should be in writing was intended for the protection of lienholders and saying: "We conclude that for the reasons fully given in the late case of *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391, the plaintiff cannot claim the contract to be void as between the parties to it"); and see *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 27 Pac. 414, 420, and *Camp v. Behlöv*, 2 Cal. App. 699, 84 Pac. 251 (decided under section 1183 as it stood prior to the amendment of 1911 and holding to the same effect as *Sullivan v. California Realty Co.*, supra).

4. *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113; *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391.

son.⁵ While the law of the place of the performance of a contract governs as to its construction and legal effect, nevertheless, as a general proposition, the law of the place where the contract is made controls as to its execution and validity, including the capacity of the parties to make the contract.⁶

§ 148. Necessity for Writing.—A verbal promise is sufficient at common law, and hence is valid in California, where there is nothing in the statutes which changes the rule.⁷ The code provides that

“All contracts may be oral, except such as are specially required by statute to be in writing.”⁸

And it is only when the agreement is required by statute to be in writing that evidence thereof cannot be received without a writing.⁹

Section 1624 of the Civil Code enumerates certain contracts the validity of which requires that they, or some note or memorandum of the transactions, be in writing and subscribed by the party to be charged, or by his agent.¹⁰ Where it is clearly made to appear that there has been a performance by a party on his part, of an oral agreement required by statute to be in writing, under such circumstances as to make it inequitable to allow the other party receiving the benefit thereof to repudiate it on the ground that it was not in writing, he is estopped from doing so.¹¹ Section 10 of the act of 1861, concerning rail-

5. *First Nat. Bank v. Perris I. Dist.*, 107 Cal. 55, 40 Pac. 45.

6. *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, 157 Pac. 630. See *CONFLICT OF LAWS*, vol. 5, p. 449.

7. *Neville v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054; *Hopkins v. Delaney*, 8 Cal. 84.

8. Civ. Code, § 1622; *Converse v. Scott*, 137 Cal. 239, 70 Pac. 13; *Byers v. Locke*, 93 Cal. 493, 27 Am.

St. Rep. 212, 29 Pac. 119. See *ASSIGNMENTS*, vol. 3, p. 262, as to necessity for assignments to be in writing.

9. Code Civ. Proc., § 1973; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119. See *EVIDENCE*.

10. See *FRAUDS, STATUTE OF*.

11. *Pearsall v. Henry*, 153 Cal. 314, 318, 95 Pac. 159; *Heffernan v. Davis*, 24 Cal. App. 295, 140 Pac. 716.

road corporations, provided: "No contract shall be binding upon the company unless made in writing."¹² This provision, it was declared "must be limited to contracts wholly executory. It cannot refer to those liabilities which the law itself implies from benefits received and actually enjoyed, where the services have been performed on the one side and received and enjoyed on the other."¹³ Where an agreement is required to be in writing, it is presumed to be so and a writing need not be alleged.¹⁴

There is no statute requiring the contract known as an account stated to be in writing.¹⁵ Nor is a contract for extra work, or for the extension of time, under a building contract, required to be in writing.¹⁶ While a parol contract of insurance may be made, proof of such an agreement must be clear and convincing, because, ordinarily, insurance is obtained by the issuance of elaborate written policies.¹⁷ Such being the rule it follows that where an oral agreement of insurance is the basis of an action, it must be set forth in the complaint.¹⁸ If made prior to 1905, an oral contract to dispose of property on death in a particular way may be enforced.¹⁹ Prior to the amendments, in 1905 and 1907, of section 1624 of the Civil Code and of section 1973 of the Code of Civil Procedure, it was not required that an agreement to such effect should be in writing.²⁰ A provision in a municipal charter requiring contracts of the city to be in writing and signed by the mayor or some

12. Repealed by Civ. Code, § 288.

13. *Foulke v. San Diego S. P. R. Co.*, 51 Cal. 365.

14. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454; *Bradford Investment Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926 (citing authorities).

15. *Converse v. Scott*, 137 Cal. 239, 70 Pac. 13. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 197.

16. *Barilari v. Ferrea*, 59 Cal. 1.

17. *Law v. Northern Assur. Co.*, 165 Cal. 394, 132 Pac. 590; *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720.

18. *Law v. Northern Assur. Co.*, 165 Cal. 394, 132 Pac. 590. See INSURANCE.

19. *Doolittle v. McConnell*, 178 Cal. 697, 174 Pac. 305; *Steinberger v. Young*, 175 Cal. 81, 165 Pac. 432. See WILLS.

20. *Steinberger v. Young*, 175 Cal. 81, 165 Pac. 432.

other person authorized thereto, in behalf of the city, is constitutional and valid, and is not in conflict with the provisions of the Civil Code concerning the manner of creating contracts, nor void under section 6 of article XI of the constitution, which declares that such charters "shall be subject to and controlled by general laws."¹

§ 149. Agreement to Reduce Contract to Writing.—

The decisions are not entirely in harmony with regard to the effect of an agreement that a contract shall be expressed in a mode more formal than that originally adopted. It has been declared to be the general rule that where parties agree to reduce to writing contracts of a certain character wherein they propose to set forth the terms of the agreement verbally made, and then fail to put their agreement in writing, there is a failure to make a completed contract, and that an action on such an agreement cannot be maintained, notwithstanding that one of the parties may have partly executed the terms thereof.² But in one instance the court said, in reply to argument of counsel: "It may be conceded that when the minds of the parties have met respecting the terms and conditions of the more formal writing that is to be executed by them, and the agreed terms of the contract thereafter to be executed are certain and in all respects definitely understood and agreed upon in advance, either orally or by informal writing, there is in such case an obligatory contract dating from the making of the earlier agreement." "But," the court continued, "it also is elementary law that, unless the

1. *Frick v. City of Los Angeles*, 115 Cal. 512, 47 Pac. 250 (decided under section 207 of the charter of the city of Los Angeles, Stats. 1889, p. 506).

2. *Las Palmas Winery & Distillery v. Garrett & Co.*, 167 Cal. 397, 139 Pac. 1077; *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797 (contract to furnish building materials); Pa-

cific R. & M. Co. v. *Riverside etc. Ry. Co.*, 90 Cal. 627, 27 Pac. 525; *Fuller v. Reed*, 38 Cal. 100 (agreement to pay for services rendered in negotiating sale of realty); *Durst v. Jolly*, 35 Cal. App. 184, 169 Pac. 449. See *supra*, § 33, as to agreements that acceptance of offer shall be expressed in writing.

agreement to execute the future contract be definite and certain upon all the subjects to be embraced, so that nothing is left for future negotiation, it is nugatory."³ So, too, while recognizing the rule to be as first stated above, it has been declared that where a contract is of such a nature that the law does not require it to be in writing, and its terms are in the first instance definitely agreed upon, then the mere fact that immediately thereafter the parties agree to evidence the contract by a written instrument does not interfere with the force and effect of the oral agreement.⁴

§ 150. Contract Partly Oral and Partly Written—Incomplete Instruments.—A contract partly in writing and partly oral is, in legal effect, an oral contract. "It occurs where an incomplete writing, or one expressing only a part of what is meant, is, by oral words, rounded into the full contract; or, where there is first a written contract and afterwards it is changed orally." But where a written contract refers to dimensions to be fixed by a civil engineer, and on the day that it was signed the contractor knew that the dimensions had been fixed by the engineer, and agreed thereto, and commenced work in accordance therewith, the contract cannot be considered as partly in writing and partly in parol.⁵

Blanks left in writings not under seal may, except so far as they may be prohibited by the statute of frauds, be filled pursuant to parol authority, and it has been laid down generally that if one signs an instrument containing blanks, he intends them to be filled in by the person to whom it is delivered.⁶ If a blank be left or a word or phrase of importance omitted by mistake, the omission

3. *Fly v. Cline*, 33 Cal. App. Dec. 289, 193 Pac. 615. See *supra*, § 24.

4. *Conner v. Plank*, 25 Cal. App. 516, 144 Pac. 295.

5. *Fabian v. Lammers*, 3 Cal.

App. 109, 84 Pac. 432 (quoting Bishop on Contracts).

6. *Thomas v. Fursman*, 39 Cal. App. 278, 178 Pac. 870 (assignment of claim for services and materials pending action on same).

may be supplied if the instrument contains the means of supplying it with certainty.⁷

Where a writing appears to be merely an incomplete memorandum, or is partly in writing or partly in parol, extrinsic evidence is admissible to show what the mutual stipulations were. But this is true only as to those matters concerning which the written memorandum is silent or as to which terms are used which import ambiguity or uncertainty—i. e., which on their face admit of doubt as to what the parties meant by their use. A further principle is not to be overlooked, namely, that extrinsic evidence is not admissible to show that a contract was partly written and partly oral, if the matter proposed to be made part of the contract by such evidence is inconsistent with the terms of the writing.⁸

§ 151. Execution in General.—Since the distinction between sealed and unsealed instruments has been abolished,⁹ the sealing of a written contract is not a necessary part of the formality in executing such an instrument. The term “execute,” as applied to instruments in writing is generally considered as importing both a signing and a delivery, and of course this significance attaches in the case of contracts in writing.¹⁰ Section 1933 of the Code of Civil Procedure provides that “The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.”¹¹ Where the terms of a verbal

7. *Wilson v. Samuels*, 100 Cal. 514, 35 Pac. 148, 559 (quoting *Page on Contracts*). As to the filling of blanks constituting the alteration of instruments, see *ALTERATION OF INSTRUMENTS*, vol. 1, p. 1083.

8. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938; *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948. See *infra*, § 161 et seq. See, also, *EVIDENCE*.

9. See *infra*, § 154.

10. *Ivey v. Kern County Land*

Co., 115 Cal. 196, 46 Pac. 926; *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111; *Clark v. Child*, 66 Cal. 87, 4 Pac. 1058; *Bagley v. McMickle*, 9 Cal. 430 (action on promissory notes); *Elliott v. Merchants' Bank etc. Co.*, 21 Cal. App. 536, 132 Pac. 280; *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 Pac. 42 (note and mortgage).

11. *Howard Ins. Co. of New York v. Silverberg*, 89 Fed. 168 (undertaking on appeal).

contract are reduced to writing, but the written paper is neither signed nor delivered, the contract will be deemed inchoate and incomplete, and neither party will be bound by it.¹² And a contract, purporting to be made between several parties, containing mutual covenants of which those of one party are the consideration of those of the others, must, to be valid, be executed by all, and cannot be enforced against one executing, by another who fails to execute.¹³ But an agreement signed and delivered by the promisor, and accepted and acted upon by both parties, is sufficiently executed to make it a binding obligation of the party signing it.¹⁴

As a general rule, a contract is deemed to have been executed at the place where the last act in its execution was performed.¹⁵ Thus where a contract was prepared and signed by one of the parties in California and then forwarded to the other party in another state, and the latter after making a substantial change in one of its provisions returned it with advices as to the change, whereupon the

12. *Hoen v. Simmons*, 1 Cal. 119, 52 Am. Dec. 291. This rule is of course affected by subsequent conduct of the parties, see *infra*, §§ 152, 153. And see as to assent by conduct, *supra*, §§ 33, 34.

13. *Emeric v. Alvarado*, 64 Cal. 529, 574, 577, 578, 579, 580, 2 Pac. 418; *Tewksbury v. O'Connell*, 21 Cal. 60 (distinguished in *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 485, holding where deed and contract requiring return of deed on payment of debt were made at same time, and control imposes no obligation on grantor, and delivery is not conditioned on his signing it, it is not invalid for lack of his signature); *Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 463, 86 Pac. 817.

14. *Sparks v. Mank*, 170 Cal. 122, 148 Pac. 926; *Gallagher v. Equitable Gas L. Co.*, 141 Cal. 699, 75 Pac. 329 (applying rule where gas company's agent modified contract for supply of gas to plaintiff's hotel at specified rate so long as it was used in hotel and company filed away contract and acted upon it); *Lavenson v. Wise*, 131 Cal. 369, 63 Pac. 622; *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037; *Reedy v. Smith*, 42 Cal. 245. And see *infra*, § 153.

15. *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 65 L. R. A. 90, 74 Pac. 855; *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926. See *infra*, § 155, as to delivery. See *CONFLICT OF LAWS*, vol. 5, p. 449.

California party, by letter, accepted the modification, it was held that the contract was executed in California.¹⁶

A contract executed in duplicate is in effect one instrument.¹⁷

Revenue stamps.—The decisions rendered under an early federal internal revenue act providing that certain instruments, unless stamped in the manner required, should not be “recorded, or admitted, or used as evidence, in any court,” are to the effect that the act embraced only proceedings had and acts done in public offices and courts of the United States, and by authority of acts of congress, and that the omission of a revenue stamp could not be set up as a defense in a state court to an action on a contract.¹⁸

§ 152. *Signature.*—While, as has been seen, the execution of an instrument includes more in legal contemplation than merely signing, the terms “execution” and “signing” are often used interchangeably.¹⁹ As an essential of every contract there must be an agreement and meeting of minds.²⁰ Hence, in the nature of things, the agreement must precede the signature, however speedily thereafter such signature may follow.¹ The place of the signature is immaterial except in cases where the law specifies

16. *Michelin Tire Co. v. Coleman & Bentel Co.*, 179 Cal. 598, 178 Pac. 507.

17. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926.

18. *Thomasson v. Wood*, 42 Cal. 416; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617, (overruling *Hallock v. Jaudin*, 34 Cal. 167); *Bennett v. Morris*, 4 Cal. Unrep. 834, 37 Pac. 929. See, also, *Ong v. Cole*, 31 Cal. App. Dec. 447, 188 Pac. 812, where it was held that a deed which was properly stamped when offered for record was not void although at the time it was executed no United

States revenue stamps were placed thereon. See *DEEDS*.

As to act of February 24, 1919, c. 18, providing for the levying of stamp taxes upon promissory notes, conveyances, etc., see *Fed. Stats. Ann., Supp. 1919*, p. 174 et seq.; *Fed. Stats. Ann., Supp. 1920*, p. 550 (note).

19. *Elliott v. Merchants Bank etc. Co.*, 21 Cal. App. 536, 132 Pac. 280; *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111. See *supra*, § 151.

20. See *supra*, § 22 et seq.

1. *Harper v. Goldschmidt*, 156 Cal. 245, 134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689, 104 Pac. 451.

a particular place.³ The words "signed" and "subscribed," although of different derivations, and although their literal meanings have a shade or two of difference, are substantially, both in common and in law language, the same—except where in a statute, or in connection with a context, some peculiar or additional meaning to either of the words is indicated. To subscribe is to attest or give consent, or evidence knowledge, by underwriting usually, but not necessarily, the name of the subscriber.³

But a signature is not indispensable to the validity of a contract. Parties may reduce their agreements to writing, and if afterwards it is agreed that such writing contains their true intention and they proceed according to such memorandum, it will be as binding as if signed by them respectively.⁴ Where the signature of a party is, at his request and in his immediate presence, affixed by a third person, it is as much the contract of the former as if signed by himself.⁵ And a plaintiff may show by oral evidence that the written contract, pleaded in his complaint and signed by another than himself, was signed by

2. *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978. See *WILLS*.

3. *California Canneries Co. v. Scatena*, 117 Cal. 447, 49 Pac. 462.

"To sign, in the primary sense of the word, is to make any mark. To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made. And while, by long usage and custom, signature has come generally to mean the name of a person written by himself, and thus to be nearly an exact synonym of autograph, that signification is derivative, and is not inherent in the word itself any more than it is in autograph, which strictly conveys no more than the idea of a specimen of an in-

dividual's writing. Any mark may be a signature, and that species of mark which we call a cross (independent of an accompanying name) was early used as a signature of assent, and indeed was designated signum. While marksmen have become fewer with the spread of education, the mark of the cross is still recognized by statute law as a method of signing." In re Walker, 110 Cal. 387, 52 Am. St. Rep. 104, 30 L. R. A. 460, 42 Pac. 815.

4. *Lafont v. Gaucheron*, 1 Cal. Unrep. 30.

5. *Harris v. Harris*, 59 Cal. 620; *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84. As to sufficiency of signature with lead pencil, see note, 8 A. L. R., p. 1339.

such person as agent for the plaintiff or as a mere matter of convenience, and that the plaintiff is the real party in interest.⁶ A contract between A and B of one part, and C and D of the other part, however, is not a contract between A and C, and, if signed by them only, it is not executed, and creates no reciprocal rights and obligations between the parties signing.⁷

Where a written agreement is signed and executed by the parties, and at the same time an addition is made in writing upon the same paper, beneath the signature, which additional writing is not signed by either of the parties independent of the signatures of the parties which precede it, parol evidence may be introduced to show whether the parties intended this addition to form a part of the contract.⁸ It has been held that an executory contract by the terms of which one party is to perform work in the future in consideration of a conveyance of property already made to him by the other party, need only be signed by the party to perform in the future.⁹ A contract is not defectively executed by public officers, from the fact that they sign it with their individual names, and not with the name of the state. Such an objection is applicable only to contracts of a private character, made in cases of a mere private agency. A different rule exists in reference to contracts executed by agents of the government. In such cases, the presumption prevails that the parties contract, not personally, but merely officially, within the sphere of their appropriate duties.¹⁰ When no claim is made that the signature of either party was obtained by fraud, duress or undue influence and reformation is not sought for mutual mistake, the parties are deemed bound by the plain import of the language used.¹¹

6. Otten v. Spreckels, 24 Cal. App. 251, 141 Pac. 224.

7. Mullarky v. Young, 9 Cal. App. 686, 100 Pac. 709.

8. Verzan v. McGregor, 23 Cal. 339.

9. Luckhart v. Ogden, 30 Cal. 547.

10. State v. McCauley, 15 Cal. 429. See AGENCY, vol. 1, p. 831; PUBLIC OFFICERS.

11. Silva v. Silva, 32 Cal. App. 115, 162 Pac. 142.

§ 153. Failure of All Parties to Sign.—Although it has been stated that the failure of one of the parties to sign an agreement containing obligations of two will be ground for an inference that the writing was not intended as a contract of the party signing,¹² it is not the rule that a contract, which on its face purports to be inter partes, must invariably be executed by all whose names appear in the instrument before it shall be binding upon any.¹³ One reason why it is held that an agreement which is not to be operative upon one until it has been signed by another is that such signing is the consideration upon which the first signer agrees to be bound. But when a consideration for the agreement on the part of the first signer is shown to be sufficient to authorize its enforcement, he cannot be released therefrom unless he shall show clearly that there were other considerations for his signing than those named in the instrument.¹⁴ If by parol stipulation, or, a fortiori, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it, without such addition, will not bind those who have signed it; but if nothing of this appears, the parties signing will be held, though even on the face of it the signatures of the others were contemplated by the draftsman.¹⁵ And if one who has not put his name to a written contract accepts it when signed by the other party, it binds him the same as if he had signed it.¹⁶ But if a contract is drawn

12. *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484.

13. *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413; *Cavanaugh v. Caselman*, 88 Cal. 543, 26 Pac. 515.

14. *Cavanaugh v. Caselman*, 88 Cal. 543, 26 Pac. 515.

15. *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413; *Cavanaugh v. Caselman*, 88 Cal. 543, 26 Pac. 515; *People v. Stacy*, 74 Cal. 373, 16 Pac. 192; *Los Angeles v. Mellus*, 59 Cal. 444; *Barber v. Burrows*, 51 Cal. 473 (holding that if an agree-

ment indorsed on the back of a contract states that it is made between the parties to the contract it shows upon its face that it was intended to be signed by all the parties to the contract); *Mullarky v. Young*, 9 Cal. App. 686, 100 Pac. 709; *Stanton v. Singleton*, 6 Cal. Unrep. 129, 54 Pac. 587. See SURETYSHIP.

16. *Bemsberg v. Hackney Mfg. Co.*, 174 Cal. 799, 164 Pac. 792 (purchase of personalty); *Gallagher v. Equitable Gas Light Co.*, 141 Cal.

up and signed by one party, and the other declines to sign unless a new provision is inserted, the contract obviously does not bind either party.¹⁷ Similarly, a contract, though properly executed by one party, is not binding upon him when executed by a person substituted, without his consent, for the original second party.¹⁸

Where the terms of a contract are embodied in two separate instruments, each setting forth a part only of the agreement, and each is signed by only one of the parties thereto, the contract is not in contravention of the statute of frauds, and there is no want of mutuality in its terms.¹⁹ So, too, where a contract is not signed by all the parties, a subsequent contract between the same parties, signed by all of them, in which specific reference is made to the former contract, is a sufficient note or memorandum in writing of the previous contract to satisfy the statute of frauds.²⁰

§ 154. Seal.—Section 1629 of the Civil Code abolishes all distinctions between sealed and unsealed instruments.¹ Hence the presence or absence of a seal bears no weight upon the question of the validity of contracts. Where a seal is used an impression upon paper constitutes a good one, and this may be made as well by a pen as by a stamp; therefore, a scroll with the word “seal” written within it,

699, 75 Pac. 329 (contract to furnish gas); *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037 (agreement to pay for services in levying execution); *Cavanaugh v. Caselman*, 88 Cal. 543, 26 Pac. 515 (stating rule); *Reedy v. Smith*, 42 Cal. 245 (contract for construction of dam); *Heffernan v. Davis*, 24 Cal. App. 295, 140 Pac. 716 (lease); *Mullarky v. Young*, 9 Cal. App. 686, 100 Pac. 709 (holding the facts did not show such a case).

17. *Masten v. Griffing*, 33 Cal. 111.

18. *Woodard v. Grover*, 156 Cal. 581, 105 Pac. 736.

19. Civ. Code, § 1642; *Frost v. Alward*, 176 Cal. 691, 169 Pac. 379. See *infra*, § 181, as to construing instruments executed together as one contract.

20. *Walsh v. Standart*, 174 Cal. 807, 164 Pac. 795. See **FRAUDS, STATUTE OF**.

1. *Hoag v. Howard*, 55 Cal. 564. See, also, Code Civ. Proc., § 1932. See **SEALS**.

or with the initials "L. S.," is sufficient. The object of a seal, under the common law, is to give character to the instrument, and enable it to be distinguished and recognized for that which it is intended to be²—an instrument fortified by conclusive presumptions as to its validity.³ Where no words appear in the body of an instrument expressive of the intent to make it a sealed instrument, it is not such, even though the characters "L. S." are added to the signature.⁴

Corporate seals.—The rule formerly was that a corporation could not express its will, or enter into a contract, except through an instrument under seal, executed by a duly constituted agent. The modern rule is that the seal of a corporation itself performs no further or greater function than to import prima facie verity of the due execution by the corporation of written obligations—that is, it merely stands as prima facie evidence that the contracts made by corporations were executed by their authority—and no longer is a seal held to be indispensable to the execution of valid contracts by corporations.⁵

§ 155. *Delivery.*—The word "execute," when applied to a written instrument, unless the context indicates that it was used in a narrower sense, imports the delivery of the instrument.⁶ Thus, it has been held that a finding that a lease was duly executed will be construed to include its delivery.⁷ And it has been declared that the term "written instrument" means a document de-

2. *Hastings v. Vaughn*, 5 Cal. 315.

3. See *supra*, § 135.

4. *McDonald v. Bear River etc. Co.*, 13 Cal. 220.

5. *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 Pac. 964. See CORPORATIONS.

6. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926; *Le*

Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054. See *supra*, § 151. And see DEEDS.

7. *Oneto v. Restano*, 89 Cal. 63, 26 Pac. 788. But see *Davidson v. Ellmaker*, 84 Cal. 21, 23 Pac. 1026 (holding that the use of the word "execute" in the findings will not import a delivery if it is apparent that it was used as the mere synonym of the word "sign").

livered with the intention that it shall take effect in accordance with its purpose as shown by the language used therein—that the use of the word with respect to contracts and deeds of conveyance implies a delivery, without which the document is inoperative for any purpose.⁸ Section 1627 of the Civil Code provides that “The provisions of the chapter on transfers in general, concerning the delivery of grants, absolute and conditional, apply to all written contracts.”⁹ And this has been declared to be so, independent of the statutory provision.¹⁰

The elements of a delivery are that the writing must be meant, by the maker, to take immediate effect, and be presumably, or in fact, accepted by the other party.¹¹ Section 1626 of the Civil Code provides that “A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.”¹² Indeed, it has been stated that it is the final delivery as a complete contract that constitutes execution.^{12a} Ordinarily, then, the place where a contract is made depends not upon the place where it is written, dated or signed, but upon the place where it is delivered.¹³ The place of delivery is the place where the last act is performed which is necessary to ren-

8. *People v. Dadmun*, 23 Cal. App. 290, 137 Pac. 1071 (construing section 492 of the Penal Code and citing sections 1626 and 1054 of the Civil Code). See DEEDS.

9. *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99. See Civ. Code, §§ 1052-1060, as to delivery of grants. And see DEEDS.

10. *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885.

11. *Harris v. Harris*, 59 Cal. 620.

12. *Methvin v. Fidelity Mut. Life Assn.*, 129 Cal. 251, 61 Pac. 1112; *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926; *Howard Ins.*

Co. v. Silverberg, 89 Fed. 168 (holding undertaking given to affect appeal and to stay proceedings in action pending in another state was delivered only after it was filed with the clerk of the court in such other state although signed in California).

12a. *Hurlbut v. Quigley*, 180 Cal. 265, 180 Pac. 613.

13. *Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L. R. A. (N. S.) 787, 126 Pac. 153; *Loud v. Collins*, 12 Cal. App. 786, 108 Pac. 880; *Howard Ins. Co. of New York v. Silverberg*, 89 Fed. 168. See *CONFLICT OF LAWS*, vol. 5, p. 453.

der the contract obligatory;¹⁴ it is the place of execution, and, in the absence of matters constituting an estoppel, this fact may be established by parol evidence, notwithstanding a venue other than that shown to exist is designated in the date line of the instrument. Such designation is *prima facie* evidence only of the fact when disputed.¹⁵

While there are cases holding substantially that the deposit by one party in the mails of an instrument properly addressed to the other party, with postage thereon prepaid, constitutes a delivery to the other party, at the place where and the time when it is so deposited, clearly this cannot be the case unless the deposit in the mail was under such circumstances that the carrier can reasonably be considered the agent of the party to whom the instrument is addressed, rather than purely the agent of the other party.¹⁶ But the general rule is that depositing a contract in the postoffice addressed to the other party, with his assent, is a sufficient delivery thereof.¹⁷

As long as a contract remains in the hands of one party or his agent, without an agreement by the other, the execution is incomplete.¹⁸ When one party obtains possession of the document merely for purposes of examination, and retains the same against the will of the other party, there is no delivery.¹⁹ Where, however, it is retained by either party with the consent of the other, it must be con-

14. *Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L. R. A. (N. S.) 787, 126 Pac. 152; *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926.

15. *Loud v. Collins*, 12 Cal. App. 786, 108 Pac. 880.

16. *Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L. R. A. (N. S.) 787, 126 Pac. 153 (distinguishing *Ivey v. Kern County L. Co.*, 115 Cal. 196, 46 Pac. 926, and *Loud v. Collins*, 12 Cal. App. 786,

108 Pac. 880). See *supra*, § 30 et seq., as to communication of acceptance of offer.

17. *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 65 L. R. A. 90, 74 Pac. 855; *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926; *Loud v. Collins*, 12 Cal. App. 786, 108 Pac. 880.

18. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926.

19. *Haskell v. Doty*, 78 Cal. 424, 21 Pac. 10.

sidered as delivered if both understand that it has been executed and is in operation.²⁰

§ 156. Pleading and Proof of Execution.—Under general rules of pleading, the due execution of a written contract, when pleaded, is deemed admitted unless denied.¹ The law presumes, under the allegation of due execution, that the contract was made in compliance with the statute of frauds.² And an allegation in a complaint that the defendants executed the written contract sued on means that all of them executed it. A general demurrer admits the truth of the statement, and the fact that a copy of the contract attached as an exhibit to the complaint does not show the signature of one of the defendants thereto is not an allegation; at most it creates an uncertainty on the subject, a defect that cannot be reached by a general demurrer.³ But a denial by the defendant, on information and belief, of the execution and delivery of a contract, is not tantamount to an admission of its due execution, in the presence of positive denials that the plaintiff is the real party in interest and that the person whose name is subscribed signed as a matter of convenience or as agent for the plaintiff.⁴ And an answer which avers facts showing that a lease, though signed by the defendants, was never delivered to them, but was delivered only to their assignee to whom it was assigned at plaintiff's request, sufficiently denies an averment in the complaint of the execution of the lease to the defendants.⁵ Under an an-

20. *Oneto v. Restano*, 89 Cal. 63, 26 Pac. 788. See *DEEDS*.

1. See *PLEADING*.

2. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454; *McMenomy v. Talbot*, 84 Cal. 279, 23 Pac. 1099; *Rundell v. Mc-*

Donald, 41 Cal. App. 175, 182 Pac. 450. See *FRAUDS, STATUTE OF*.

3. *Walsh v. Standart*, 174 Cal. 807, 164 Pac. 795. See *PLEADING*.

4. *Otten v. Spreckels*, 24 Cal. App. 251, 141 Pac. 224.

5. *Stetson v. Briggs*, 114 Cal. 511, 46 Pac. 603.

swer denying generally the execution of the contract sued on, the defense of the statute of frauds is available.⁶

Section 448 of the Code of Civil Procedure provides that

“When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant.”

However, the effect of an admission of the genuineness and due execution of an instrument pleaded by a defendant, and not denied, as provided by section 448 of the Code of Civil Procedure, is to avoid the necessity of proof of its genuineness and due execution, and nothing more; and whether it is proven or its execution is admitted its terms and legal effect are to be determined by an inspection of the instrument.⁷ Notwithstanding this admission the contract may be controverted by evidence of mistake, fraud and like defenses, or it may be shown that it has no connection with the demand sued upon.⁸ Where the party offering an instrument makes out a *prima facie* case of its execution, the other party should not be allowed to introduce counter proof before the instrument is read to the jury.⁹

Parol evidence is admissible when it relates to the execution or authenticity of an instrument, or to its delivery, or to the question whether the delivery was absolute or conditional. The execution and acts of delivery being largely a matter in pais, oral declarations of intentions connected

6. *Walsh v. Standart*, 174 Cal. 807, 164 Pac. 795. See FRAUDS, STATUTE OF.

7. *Carpenter v. Shinnors*, 108 Cal. 359, 41 Pac. 473 (tax deed); *Newsom v. Woollacott*, 5 Cal. App. 722, 91 Pac. 347.

8. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Newsom v. Woollacott*, 5 Cal. App. 722, 91 Pac. 347.

9. *Verzan v. McGregor*, 23 Cal. 339.

with the execution and delivery may properly come in as part of the *res gestae*.¹⁰

§ 157. Recording Building Contracts—Rule Prior to 1911.—Prior to its amendment in 1911, section 1183 of the Code of Civil Procedure provided that building contracts involving a payment of an amount exceeding one thousand dollars must be in writing and the contract or a memorandum thereof filed,

“Otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto and in such case, the labor done and materials furnished by all persons . . . , except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof.”¹¹

Although some decisions rendered under the section as it then stood are to the effect that a failure to record did not make the contract void as between the parties,¹² yet, by the great weight of authority the failure to comply with the requirements of the section rendered the contract absolutely void, and neither party could maintain any action based thereon against the other; and where the plans and specifications were a part of the contract, it was held, they must be filed with it.¹³ The provision was con-

10. *Verzan v. McGregor*, 23 Cal. 339 (quoted with approval in *Bullock v. Consumers Lumber Co.*, 3 Cal. Unrep. 609, 31 Pac. 367. See EVIDENCE.

11. *Union Oil Co. of Cal. v. Pacific Surety Co.*, 182 Cal. 69, 187 Pac. 14; *Howe v. Schmidt*, 151 Cal. 436, 90 Pac. 1056 (holding contract complied with statute); *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150 (construing section with reference to contents of memorandum); *Blinn Lumber Co. v. Walker*, 129 Cal. 62, 61 Pac. 664 (holding contract valid).

12. *Sullivan v. California Realty*

Co., 142 Cal. 201, 75 Pac. 767; *Lacy Mfg. Co. v. Los Angeles Gas etc. Co.*, 12 Cal. App. 37, 106 Pac. 413; *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420; *Needham v. Chandler*, 8 Cal. App. 124, 96 Pac. 325; *Camp v. Behlow*, 2 Cal. App. 699, 84 Pac. 251.

13. *Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009; *Mannix v. R. L. Radke Co.*, 166 Cal. 333, 136 Pac. 52; *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113; *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423; *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391; *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312; *West Coast L.*

sidered in the nature of a penalty imposed upon parties for failure to comply with provisions of the lien law designed to protect the rights of subcontractors, materialmen, artisans and laborers.¹⁴ And it was declared that the legislature might lawfully require such filing in furtherance of such purpose, and declare the contract unenforceable unless it be so filed, without unlawfully invading the constitutional right of contract.¹⁵ However, it was conceded that the contractor, in event of the contract not being recorded, had an action for the reasonable value of the labor and materials furnished,¹⁶ and that the contract, although void, nevertheless was the measure and test of his right to recover.¹⁷ He was required to show a substantial compliance with its terms to warrant any recovery at all, and the measure of his recovery, even under implied assumpsit, was limited, as to him, by the contract price.¹⁸

Co. v. Knapp, 122 Cal. 79, 54 Pac. 533; San Francisco Lumber Co. v. O'Neil, 120 Cal. 455, 52 Pac. 728; Kuhlman v. Burns, 117 Cal. 469, 49 Pac. 585; Pierce v. Birkholm, 115 Cal. 657, 47 Pac. 681; Wood v. Oakland etc. Transit Co., 107 Cal. 500, 140 Pac. 806; Butterworth v. Levy, 104 Cal. 506, 38 Pac. 897; Dunlop v. Kennedy, 102 Cal. 443, 36 Pac. 765; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; White v. Fresno Nat. Bank, 98 Cal. 166, 32 Pac. 979; Barker v. Doherty, 97 Cal. 10, 31 Pac. 1117; Willamette etc. Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Yancy v. Morton, 94 Cal. 558, 29 Pac. 1111; San Diego etc. Co. v. Wooldredge, 90 Cal. 574, 27 Pac. 431; Kellogg v. Howes, 81 Cal. 170, 6 L. R. A. 588, 22 Pac. 509; Holland v. Wilson, 76 Cal. 434, 18 Pac. 412; Palmer v. White, 70 Cal. 220, 11 Pac. 647; L. W. Blinn Lumber Co. v. Cohn,

33 Cal. App. 386, 165 Pac. 444; Watterson v. Owens River Canal Co., 25 Cal. App. 247, 143 Pac. 90; Blyth v. Torre, 4 Cal. Unrep. 912, 38 Pac. 639.

14. Condon v. Donohue, 160 Cal. 749, 118 Pac. 113; Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391.

15. Condon v. Donohue, 160 Cal. 749, 118 Pac. 113; Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 91 Pac. 265.

16. Mannix v. R. L. Radke Co., 166 Cal. 333, 136 Pac. 52; Kiessig v. Allspeugh, 91 Cal. 234, 27 Pac. 662.

17. Condon v. Donohue, 160 Cal. 749, 118 Pac. 113; Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391 (overruling Rebman v. San Gabriel Land & Water Co., 95 Cal. 390, 30 Pac. 564; Smith v. Dryden, 15 Cal. App. 568, 115 Pac. 455).

18. Mannix v. R. L. Radke Co., 166 Cal. 333, 136 Pac. 52; Congdon

The contract of a mere subcontractor and materialman was not required to be in writing or recorded, under this section.¹⁹ Nor was it necessary that a contract to furnish a new plant of machinery be recorded, even though purchase price was more than one thousand dollars.²⁰ Where the original contract was void for want of record, it was held the subcontractor did not thereby become an original contractor.¹

At all times prior to June 30, 1911, the law permitted the owner of real property, in causing the construction of any improvement thereon at a cost of not more than one thousand dollars, to provide for such improvement by a contract not filed in the recorder's office, or even by an oral contract, and to pay the consideration therefor whenever it pleased him to do so. And the provisions of the Code of Civil Procedure with reference to putting in writing building contracts, and filing them for record, and the provisions of that code relative to the mode and time of payment and the withholding of a percentage of the contract price, were not applicable thereto.²

§ 158. Present Rule as to Recording.—The present section 1183 of the Code of Civil Procedure does not make the contract void for want of filing, but does require that, it, accompanied by the contractor's bond, shall be filed in order to restrict the recovery to the amount of the contract price.³ No distinction, however, can be drawn between

v. Donohue, 160 Cal. 749, 118 Pac. 113; *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391; *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840.

19. *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

20. *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637; *Roebbling etc. Co. v. Humboldt etc. Co.*, 112 Cal. 288, 44 Pac. 568; *Hinckley v. Field Biscuit etc. Co.*, 91 Cal. 136, 27 Pac. 594; *California etc. Cement Co. v.*

Wentworth Hotel Co., 16 Cal. App. 692, 118 Pac. 103, 113.

1. *Coss v. MacDonough*, 111 Cal. 662, 44 Pac. 325.

2. *Bailey etc. Iron Co. v. Goldschmidt*, 33 Cal. App. 661, 166 Pac. 363 (citing *Southern Cal. Lumber Co. v. Jones*, 133 Cal. 242, 65 Pac. 378; *Denison v. Burrell*, 119 Cal. 180, 51 Pac. 1).

3. See *infra*, § 159, as to contractor's bond.

the two statutes with respect to what constitutes a filing of the contract. Since, under the one, the plans and specifications forming part of the contract must be filed, they must equally be filed under the other. The fact that, under the two statutes, different consequences result from a failure to file has been said not to justify a holding that the words, "the contract . . . shall be filed," have different meanings in the old and the new law.⁴ It is only the original contract which the statute requires to be filed. Hence, a contract for a second story, when simply a modification of the original contract, is not required to be filed at all, and therefore it is inconsequential whether it is filed before or after work is commenced.⁵⁻⁶

§ 159. Contractor's Bond.—The original section 1203 of the Code of Civil Procedure added in 1885 and providing for the filing of a contractor's bond⁷ was repealed in 1887.⁸ A new section 1203 was added in 1893, providing in effect that every contract required to be filed by the provisions of the chapter relating to liens of mechanics and others should be accompanied by a good and sufficient bond, and that any laborer or materialman should have an action to recover upon the bond for the value of labor and materials, not exceeding the amount of the bond, and such action should not affect his lien.⁹ The validity of this section was supported in the earlier decisions, and it was expressly declared that it was constitutional.¹⁰ Construing it in connection with section 1183 of the Code of Civil Procedure as it stood prior to 1911, requiring that building contracts involving more than one thousand dollars should

4. *Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009. See supra, § 157, for citation of cases decided under section 1183 of the Code of Civil Procedure as it stood prior to the amendment, and holding that plans and specifications should be filed.

5-6. *Hubbard v. Jurian*, 35 Cal. App. 757, 170 Pac. 1093.

7. Stats. 1885, p. 147.

8. Stats. 1887, p. 155.

9. Stats. 1893, p. 202. See **MECHANICS' LIENS**.

10. *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369; *Mangrum v. Truesdale*, 128 Cal. 145, 60 Pac. 775.

be recorded,¹¹ it was held that although the contract was void for some failure to comply with the statute, the bond nevertheless could be enforced.¹² In the later cases section 1203 was declared unconstitutional. Under this ruling, the failure to file the bond did not vitiate the contract, and any undertaking given in pursuance of the terms of the section, whether expressly so declared or so appearing by other recitals in the bond, was without consideration and void.¹³ It was held, however, that a contractor's bond which was in the form of a common-law bond, and did not refer to the statute providing therefor, though made in pursuance thereof, was valid and enforceable, without reference to the question of the validity or constitutionality of the statute.¹⁴ It is clear that no statutory authority is necessary to give validity to a contractor's bond.¹⁵

11. See *supra*, §§ 157, 158, as to recording of building contracts.

12. *Union Sheet & Metal Works v. Dodge*, 129 Cal. 390, 62 Pac. 41; *Carpenter v. Furrey*, 128 Cal. 669, 61 Pac. 369; *Mangrum v. Truesdale*, 128 Cal. 146, 60 Pac. 775 (holding bond under section 1203 void for want of filing); *Summerton v. Hanson*, 117 Cal. 252, 49 Pac. 135; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109; *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904; *Kiessig v. Allspaugh*, 99 Cal. 452, 34 Pac. 106 (overruling *Scallert etc. Co. v. Neal*, 90 Cal. 213, 27 Pac. 192; *Kiessig v. Allspaugh*, 91 Cal. 234, 27 Pac. 662; *Watterson v. Owens River Canal Co.*, 25 Cal. App. 247, 143 Pac. 90).

13. *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200; *W. W. Montague & Co. v. Furness*, 145 Cal. 205, 78 Pac. 640; *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150; *San Francisco Lumber Co. v. Bibb*,

139 Cal. 192, 72 Pac. 964; *Shaughnessy v. American Sur. Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701 (in this case the court declared that anything in *Carpenter v. Furrey*, 128 Cal. 665, "inconsistent with the views here expressed . . . must be held to have been overruled by the said subsequent case of *Gibbs v. Tally*, 133 Cal. 373," 65 Pac. 970, 60 L. R. A. 815); *Gibbs v. Tally*, 133 Cal. 373, 60 L. R. A. 815, 65 Pac. 970 (decision of department in same case reported 6 Cal. Unrep. 621, 63 Pac. 168, not sustained); *Martin v. McCabe*, 21 Cal. App. 658, 132 Pac. 606 (reviewing authorities).

14. *People's Lumber Co. v. Gil-lard*, 136 Cal. 55, 68 Pac. 576; affirmed on second appeal, 5 Cal. App. 435, 90 Pac. 556; *Alcatraz etc. Assn. v. United States Fidelity etc. Co.*, 3 Cal. App. 338, 85 Pac. 156. See *BONDS*, vol. 4, p. 350.

15. *People's Lumber Co. v. Gil-lard*, 136 Cal. 55, 68 Pac. 576.

Present rule.—The present section 1183 of the Code of Civil Procedure provides that

“In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for” [in the chapter on mechanics’ liens, the owner’s liability shall be limited to the measure of the contract price.]¹⁶

The effect is that persons contracting for the erection of buildings or structures on their property must require the contractor to furnish such bond, and must file the same with the contract in the recorder’s office, or, as an alternative, must see to it that the value of the work and materials used in the building by the contractor is paid to the persons who furnish the same. A contract not accompanied by such bond is not declared to be invalid, but it furnishes no protection to the owner against liens for labor and material on the building.¹⁷ The constitutionality of this provision has been upheld.¹⁸ It is declared that it is not unconstitutional as class legislation or for lack of uniformity of operation, or as imposing

16. *Terry v. Southwestern Bldg. Co.*, 43 Cal. App. 366, 185 Pac. 212 (holding bond was not such as relieved owner from liability of his property for liens under the statute). See **MECHANICS’ LIENS**. As to filing of bonds by contractors and subcontractors employed to construct public works, see **MUNICIPAL CORPORATIONS**;

STATE OF CALIFORNIA. And see **SURETYSHIP** as to liability of surety on contractor’s bond.

17. *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

18. *Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009; *Hammond Lumber Co. v. Willis*, 171 Cal. 565, 153 Pac. 947.

upon the owner an improper burden in addition to the right of lien given to persons furnishing labor and materials.¹⁹ A bond given under the statute is valid and enforceable, although such bond and the contract to which it refers have not been filed.²⁰ The validity of the bond is not declared to be dependent on such filing.¹ And, it has been held, the failure to file the surety bond before work is commenced and at the time of the filing of the contractor's bond does not invalidate the contract of the surety company.²

§ 160. Stipulation as to Hours of Labor.—Section 3245 of the Political Code reads as follows:

“Eight hours’ labor constitute a legal day’s work in all cases where the same is performed under the authority of any law of this state, or under the direction, control, or by the authority of any officer of this state acting in his official capacity, or under the direction, control, or by the authority, of any municipal corporation within this state, or of any officer thereof acting as such; and a stipulation to that effect must be made a part of all contracts to which the state or any municipal corporation therein is a party.”³

It is not, however, made a consequence of an omission to insert this stipulation that the contract shall be void, and the omission, therefore, does not operate a forfeiture of the rights of the parties under the contract.⁴

19. *Hollenbeck-Bush P. Mill Co. v. Amweg*, 177 Cal. 159, 170 Pac. 148; *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15. See CONSTITUTIONAL LAW for full discussion of class legislation and uniformity of operation of laws.

20. *Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009; *Hammond Lumber Co. v. Willis*, 171 Cal. 565, 153 Pac. 947. See BONDS, vol. 4, p. 350.

1. *Hammond Lumber Co. v. Willis*, 171 Cal. 565, 153 Pac. 947.

2. *Hollenbeck-Bush P. Mill Co. v. Amweg*, 177 Cal. 159, 170 Pac. 148 (citing *Hammond Lumber Co. v. Willis*, 171 Cal. 565, 153 Pac. 947).

3. See LABOR.

4. *Babecock v. Goodrich*, 47 Cal. 488, per McKinstry, J. See COUNTIES; MUNICIPAL CORPORATIONS.

IX. INTERPRETATION AND EFFECT.

General Rules.

§ 161. **In General—Code Rules.**—Where a contract has been reduced to writing, the instrument, of course, measures the rights, duties and obligations of the parties.⁵ But not infrequently doubt arises as to what rights, duties and obligations are conferred, and such questions are to be settled by application of the rules of interpretation. The statutory rules for the interpretation of contracts will be found in the Civil Code, sections 1635 to 1661, both inclusive.⁶ These sections simply lay down well-settled principles,⁷ applicable alike to all contracts.⁸ "All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code."⁹ The rules of interpretation apply to grants,¹⁰ chattel mortgages,¹¹ and leases,¹² to contracts of surety-

5. *Smith-Booth-Usher Co. v. Los Angeles Ice etc. Co.*, 175 Cal. 136, 165 Pac. 430; *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101.

6. *Humboldt Savings etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920.

7. *Payne v. Commercial Nat. Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007; *MacFarland v. Walker*, 40 Cal. App. 508, 181 Pac. 248.

8. *Caldwell v. Western Development Co.*, 35 Cal. App. Dec. 384 (holding instruments so framed that intention of parties could be ascertained by merely following general rules of interpretation); *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of fruit crop).

9. Civ. Code, § 1635.

10. Civ. Code, § 1066; *Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313 (holding grant to be interpreted against grantor under section 1069 of the Civil Code); *Van Slyke v. Arrowhead etc. Power Co.*, 155 Cal. 675, 102 Pac. 816; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049; *MacFarland v. Walker*, 40 Cal. App. 508, 181 Pac. 248; *Firth v. Los Angeles Pacific Land Co.*, 28 Cal. App. 399, 152 Pac. 935; *Peterson v. Machado*, 5 Cal. Unrep. 273, 43 Pac. 611. See DEEDS.

11. See CHATTEL MORTGAGES.

12. *Realty & Rebuilding Co. v. Rea*, 61 Cal. Dec. 11, 194 Pac. 1024; *Barron Estate Co. v. Waterman*, 32 Cal. App. 171, 162 Pac. 410; *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975. See LANDLORD AND TENANT.

ship,¹³ guaranty,¹⁴ and insurance,¹⁵ to individual bonds,¹⁶ partnership contracts,¹⁷ and to stipulations between counsel representing the parties to an action.¹⁸

It is not correct to say that the statutory rules are innovations upon the common law and are not applicable to contracts executed before the adoption of the code. That contracts are to be construed according to the laws in force at the time they were executed is true. But these rules of the Civil Code, for the most part, are parts of the common law previously existing, and are applicable to contracts executed prior to the adoption of the codes as fully as those executed since.¹⁹

Except where it is otherwise declared, the provisions of the Civil Code with respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties when ascertained in the manner prescribed by the laws relating to interpretation, and the benefit thereof may be waived by any party entitled thereto,

13. Civ. Code, § 2837; *Humboldt Sav. etc. Society v. Wennerhold*, 81 Cal. 528, 22 Pac. 920 (decision of department in same case reported 3 Cal. Unrep. 52 not sustained); *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667; *Schwab v. Bridge*, 27 Cal. App. 204, 149 Pac. 603. See SURETYSHIP.

14. *Ohio Electric Car Co. v. Le Sage*, 182 Cal. 450, 188 Pac. 982; *First Nat. Bank v. Spalding*, 177 Cal. 217, 170 Pac. 407. See GUARANTY.

15. *Schroeder v. Imperial Ins. Co.*, 132 Cal. 18, 84 Am. St. Rep. 17, 63 Pac. 1074; *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App.

624, 84 Pac. 271 (beneficiary certificate of a fraternal association). See INSURANCE.

16. *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. 59 (declaring that official bonds are to be construed with reference to the statutes bearing on them, and the liability of the obligors on such bonds has been considered very fully in several cases in this court).

17. *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147. See PARTNERSHIP.

18. *People v. Nolan*, 33 Cal. App. 493, 165 Pac. 715. And see *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788 (holding same rule applies to court order given in pursuance of a stipulation, as to stipulation itself). See STIPULATIONS.

19. *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603.

unless such waiver would be contrary to public policy.²⁰ But in any case, the parties are entitled to a judicial construction of their contract.¹

§ 162. Evidence to Aid.—It has been said that the rule that the terms of a written contract cannot be changed or varied by parol testimony or evidence extrinsic to the writing itself is now elementary and has been expressly adopted into our system of laws and is embraced in a number of sections of our codes, one of which is section 1856 of the Code of Civil Procedure.² The rule forbids adding by parol where the writing is silent, as well as varying where it speaks.³ However, where the question is not as to the contents of a writing, but as to whether one has been made or not, and the question comes collaterally in issue, it may be proved by parol.⁴ The sections of the Civil Code relating to the interpretation of contracts, contemplate the introduction of parol evidence, for it is only upon the introduction of such evidence

20. Civ. Code, § 3268; *Boole v. Union Marine Ins. Co.*, 34 Cal. App. Dec. 970, 198 Pac. 416; *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; *Blochman Commercial etc. Bank v. Ketcham*, 36 Cal. App. 284, 171 Pac. 1084.

1. *McGillvray Construction Co. v. Hoskins*, 36 Cal. App. Dec. 480 (construing clause in contract as giving engineer power to determine disputes arising in the performance of the work which might prevent the work from progressing unless determined on the spot, and not as depriving the parties of their rights to a judicial construction).

Declaratory judgment construing contract, note, 12 A. L. R. 80.

2. *Peterson v. Wagner*, 34 Cal. App. Dec. 823, 198 Pac. 25 (sale

of crop of hops). See *infra*, §§ 225-229, as to modification of contracts, where section 1698 of the Civil Code is discussed. See, also, Civil Code, §§ 1625, 1697. See EVIDENCE.

3. *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, 96 Pac. 319; *Johnson v. Bibb Lumber Co.*, 140 Cal. 95, 73 Pac. 730; *Hogan v. Anthony*, 34 Cal. App. Dec. 930, 198 Pac. 47; *White v. Schader*, 31 Cal. App. Dec. 457.

4. *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386.

In a case where the writing itself, through mistake, does not express the intention of the parties who entered into it, or one of them, and does not therefore contain the real contract between the parties, the objection as to parol proof is without merit. *McCombs v. Church*, 180 Cal. 233, 180 Pac. 535.

that it can be ascertained whether or not the principles embodied in those sections are pertinent to the facts of any particular case.⁵ In the case of an extrinsic or latent ambiguity in a contract, the court is permitted to receive evidence in aid of its interpretation.⁶ It is said not to be strictly accurate to say that the subject matter must be absolutely certain from the writing itself, or by reference to some other writing. Parol evidence is always admissible to explain the surrounding circumstances, and the situation and relations of the parties at and immediately before the execution of the contract in order to connect the description with the thing intended, and thereby to identify the subject matter, and to explain all technical terms and phrases used in a special or local sense. The true rule is said to be that the situation of the parties and the circumstances when the contract was made may be shown by parol evidence, so that the court may be placed in the position of the parties themselves and if then the subject matter is identified, and the terms appear reasonably certain, it is enough. This is in consonance with the maxim, "*certum est quod certum reddi potest.*"⁷

It has been declared, however, that if the code provisions authorize the introduction of parol evidence to ascertain the intention of the parties, where the contract is ambiguous or uncertain, this does not mean whenever the proper interpretation is a difficult matter, or one about which men may differ. If, after a full consideration,

5. *Payne v. Commercial Nat. Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007; *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Thomas D. Campbell & Co. v. Holahan*, 32 Cal. App. Dec. 934, 192 Pac. 121; *Lang v. Pacific Brewing & Malting Co.*, 30 Cal. App. Dec. 758, 59 Cal. Dec. 161, 187 Pac. 81.

6. Code Civ. Proc., §§ 1860, 1856, p. 2; *California Packing Corp. v. Larson*, 33 Cal. App. Dec. 765;

Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948. And see *infra*, § 171.

7. *Payne v. Commercial Nat. Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007; *Preble v. Abrahams*, 88 Cal. 245, 22 Am. St. Rep. 301, 26 Pac. 99 (quoting *Pomeroy on Contracts*); *Brewster v. Lathrop*, 15 Cal. 21; *Brannan v. Mesick*, 10 Cal. 95; *Blasholder v. Guthrie*, 17 Cal. App. 297, 119 Pac. 524. See EVIDENCE.

with a full knowledge of the circumstances, the court is able to declare with certainty what the intention of the parties was, from the writing itself, no matter how difficult the task may be, the contract is not ambiguous or uncertain, within the meaning of the rule, and the court cannot, as it is said, travel outside the four corners of the instrument.⁸ No authority sustains the proposition that, under the guise of construction or explanation, a meaning can be given to an instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that, in the admission of extrinsic evidence, the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written, and not what was intended to be written.⁹

Inadmissible parol evidence tending to contradict the terms of a written contract should not, when received in opposition to oral testimony corresponding with the unambiguous language in the contract, be allowed to render nugatory the words of the instrument.¹⁰ Where a contract is a complete workable and unambiguous instrument it does not require either evidence of usage or implication of law to interpret it.¹¹

Controversy with strangers.—In an action between a party to a contract and a third party the rule that parol

8. *San Diego Flume Co. v. Chase*, 3 Cal. Unrep. 792, 32 Pac. 245.

9. *Payne v. Commercial Nat. Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007; *Osborn v. Henry Cowell Lime etc. Co.*, 37 Cal. App. 67, 173 Pac. 492 (holding evidence of conversation with reference to lease inadmissible as tending to vary language of instrument which was clear).

10. *Tyler v. Stone*, 81 Cal. 236, 22 Pac. 598.

11. *Gero v. Richey*, 38 Cal. App. 21, 175 Pac. 91; *Suhr v. Metcalfe*, 33 Cal. App. 59, 164 Pac. 407 (building contract); *J. F. Hall-Martin Co. v. Hughes*, 18 Cal. App. 513, 123 Pac. 617. See *infra*, §§ 186-188, as to law and usage as part of contract. And see EVIDENCE.

evidence cannot be received to contradict or vary a written contract does not apply, as the estoppel on which the rule rests must be mutual, and, since the third person is not bound by the contract as written, neither is his adversary in the action.¹² Strangers are at liberty to show that the written instrument does not disclose the full or true character of the relation between the contracting parties.¹³ And if a stranger be thus at liberty, when contending with a party to the contract, the latter must be equally free to show the true relation between himself and the one with whom he has contracted. Both must be bound by this conventional rule of law, or neither.¹⁴

Lost contract.—The rights of the parties to a written contract must be ascertained from its terms; and whether the writing be lost or not, evidence of the intention of the parties in making it is inadmissible, in the absence of fraud or mistake. The code expressly provides, in case of lost instruments, for oral evidence of their contents.¹⁵

§ 163. Intention of Parties.—The primary object of all interpretation is to ascertain and carry out the intention of the parties.¹⁶ “To interpret a contract is to ascertain

12. Bituminized Brick & Tile Co. v. Simons Brick Co., 183 Cal. 687, 192 Pac. 528; *In re Smith's Estate*, 176 Cal. 729, 171 Pac. 289; *Massie v. Chatom*, 163 Cal. 772, 127 Pac. 56; *Smith v. Goethe*, 159 Cal. 628, Ann. Cas. 1912C, 1205, 115 Pac. 223; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *Smith v. Moynihan*, 44 Cal. 53; *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 183 Pac. 178; *Greve v. Echo Oil Co.*, 8 Cal. App. 275, 96 Pac. 904. See EVIDENCE.

13. *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 183 Pac. 178.

14. *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 183 Pac. 178; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354.

15. Code Civ. Proc., §§ 1855, 1870, subd. 14; *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101. See LOST INSTRUMENTS.

16. *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603; *First Nat. Bank v. Powers*, 141 Cal. 253, 74 Pac. 856; *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. 59; *Racouillat v. Sansevain*, 32 Cal. 376; *Brannan v. Mesick*, 10 Cal. 95; *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Blochman Commercial etc. Bank v. Ketcham*, 36 Cal. App. 284, 171 Pac. 1084; *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667; *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975.

the true intent of the contracting parties."¹⁷ All the rules of interpretation must be considered and each given its proper weight, where necessary, in order to arrive at the true effect of the instrument. There are qualifications, of course, to the effect that the intention must be lawful, and that the construction must not be contrary to positive rules of law.¹⁸ The familiar rules embodied in the provisions of the Civil Code for the interpretation of written instruments are all designed to aid in ascertaining the intention of the parties.¹⁹ Section 1636 provides:

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."²⁰

And section 1640 provides:

"When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties

17. *Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121.

18. *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603.

19. *Reedy v. Smith*, 42 Cal. 245; *McPherson v. Great Western Milling Co.*, 30 Cal. App. Dec. 669, 186 Pac. 803; *Gero v. Richey*, 38 Cal. App. 21, 175 Pac. 91. See, also, *Code of Civ. Proc.*, § 1859.

20. *Southern Pac. Co. v. Spring Valley Water Co.*, 173 Cal. 291, 159 Pac. 865 (grant of right of way for pipe-line in consideration of promise to furnish grantor with water without charge); *Pavkovich v. Southern Pac. R. R. Co.*, 150 Cal. 39, 87 Pac. 1097 (deed of quarry and right of way thereto with limitations); *Ames v. Southern Pacific Co.*, 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 310 (railroad ticket); *McCloskey v. Tierney*, 141 Cal. 101, 99 Am. St. Rep. 33, 74 Pac. 699

(holding instrument should be construed as a present assignment of claim); *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362 (property settlement between husband and wife, including homestead); *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62 (agreement to devote time to management of property in consideration of purchase of same); *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189 (insurance policy); *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049 (deed construed to convey life estate); *Humboldt Savings etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920 (bond of corporation officer); *Perkins v. Ophir Silver Min. Co.*, 35 Cal. 11 (contract to receive and forward freight); *Wagenblast v. Washburn*, 12 Cal. 208 (deed); *Swain v. Graves*, 8 Cal. 549 (appeal bond); *Hooper v. Los Angeles*

such intention is to be regarded, and the erroneous parts of the writing disregarded."¹

However, the intention of the parties should be given effect regardless of technical rules of construction.²

Intention is to be ascertained from a consideration of the language employed and the subject matter of the contract.³ Resort is first had to the contract itself; and if the intention is doubtful under the terms of the instrument, the surrounding circumstances may be consid-

Valve and Fitting Co., 36 Cal. App. Dec. 571 (agreement with reference to fixing of values by appraisers); Levin v. Saroff, 36 Cal. App. Dec. 214 (question whether instrument was lease in praesenti or agreement to execute lease in futuro); Armstrong v. Sacramento Valley Realty Co., 34 Cal. App. Dec. 884, 198 Pac. 217; California Packing Corp. v. Grove, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of crop of fruit); Farnham v. Huston, 39 Cal. App. 687, 179 Pac. 701 (deed); Blochman Commercial etc. Bank v. Ketcham, 36 Cal. App. 284, 171 Pac. 1084 (promissory note—place of payment); Betts v. Orton, 34 Cal. App. 397, 167 Pac. 1147 (payment of promissory note); Henne v. Summers, 16 Cal. App. 67, 116 Pac. 86 (lease); House v. McMullen, 9 Cal. App. 664, 100 Pac. 344 (contract to sell land); Austin v. Union Paving etc. Co., 4 Cal. App. 610, 88 Pac. 731 (appeal bond); National Bank of Commerce v. Schirm, 3 Cal. App. 696, 86 Pac. 981 (note given as collateral); Johnson v. Levy, 3 Cal. App. 591, 86 Pac. 810 (lease of livery-stable); Moreing v. Weber, 3 Cal. App. 14, 84 Pac. 220 (private contract for street work); Parrish v. Rosebud Mining & Milling Co., 7 Cal. Unrep. 117, 71 Pac. 694; sustained in 140 Cal. 635, 74 Pac. 312 (contract of

guaranty); Peterson v. Machado, 5 Cal. Unrep. 273, 43 Pac. 611 (deed conveying right of way); Standard American Dredging Co. v. City of Oakland, 262 Fed. 315 (construing dredging contract and approving of construction of same contract by the court in Standard American Dredging Co. v. City of Oakland, 30 Cal. App. 237, 157 Pac. 833).'

1. Lassing v. James, 107 Cal. 348, 40 Pac. 534. And see Bradbury v. Higginson, 167 Cal. 553, 140 Pac. 254, where the court declares that whatever may be the real scope of section 1640 of the Civil Code, it cannot have the effect of authorizing a court, in the absence of a showing of a right of reformation, to find, upon oral testimony, that a written contract includes provisions which do not appear upon its face, and to enforce such provisions as a part of the written contract.

2. Pavkovich v. Southern Pac. R. Co., 150 Cal. 39, 87 Pac. 1097 (applying rule where qualifying clauses in deed were not irreconcilable); Faivre v. Daley, 93 Cal. 664, 29 Pac. 256 (deed).

3. Los Angeles Gas & Electric Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 Pac. 55; Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305.

ered to determine its meaning.⁴ The court will ascertain the relation of the parties to each other, and to the subject matter, and if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, if it can be done without disregarding the language of the instrument.⁵ But the intention is to be ascertained, not from the facts as they actually were, but from the facts as the parties supposed them to be.⁶ A contract must be construed with reference to the obligations which its terms imposed, rather than to any statement of fact as having represented the actual occurrences which followed.⁷ The understanding of the parties as to the rights of each under the contract must be ascertained and enforced so as to protect the rights of all of them. As to the hardships, advantages or disadvantages which may result from proper construction, the court has nothing to do.⁸ A contract which does not express the intention of the parties cannot be enforced according to their intention without it first being reformed to make it express such intention.⁹ The law will enforce contracts, but cannot undertake to make them.¹⁰ Moreover, where parties have entered into a lawful contract and clearly expressed their intention, the legislature cannot provide a different contract for them.¹¹

4. *Schwab v. Bridge*, 27 Cal. App. 204, 149 Pac. 603. See *infra*, § 180.

5. *First Nat. Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856 (citing authorities); *Thompson v. McKay*, 41 Cal. 221; *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978. See *infra*, § 203, as to relation of parties.

6. *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694.

7. *Kurtz v. De Johnson*, 42 Cal. App. 221, 183 Pac. 588.

8. *Gazos Creek Mill etc. Co. v. Coburn*, 8 Cal. App. 150, 96 Pac. 359.

9. *De Witt v. Duncan*, 46 Cal. 342; *White v. Greenwood*, 35 Cal. App. Dec. 258, 199 Pac. 1095; *Third Street Imp. Co. v. McLelland*, 23 Cal. App. 369, 137 Pac. 1089. See REFORMATION OF INSTRUMENTS.

10. *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 66 Pac. 21. See *infra*, § 192.

11. *Treloar v. Keil & Hannon*, 36 Cal. App. 159, 171 Pac. 823.

§ 164. Nature — Subject Matter—Purpose.—The most important duty of a court in interpreting a contract is to discover the true meaning of the instrument.¹² Its endeavor is directed first to attaining an understanding of the purpose of the writing; and next to the giving to that purpose the fullest effect compatible with the meaning of the language through which it finds expression;¹³ to the rendering of that form of judgment which will be most effectual.¹⁴ That construction should be followed which will accomplish the object for which the agreement was executed, though violating the strict rules of grammatical construction.¹⁵ Words, phrases and sentences, therefore, are construed in contemplation of the fundamental purpose and object, and when there is any doubt of their precise meaning, aid in arriving at that meaning is drawn from the general rules governing the construction of such doubtful language.¹⁶ And although the description of an instrument by the parties may bear some weight upon the question of its interpretation,¹⁷ there can be no doubt that the court may look beyond the form into which the parties have cast their contract. Neither the form nor the name given it controls interpretation. In determining the real character courts will always look to the purpose of the instrument, rather than to the name given it by the parties.¹⁸ The designation of a contract by an improper term cannot be allowed to take away a substantial right, where all the circumstances attending

12. *Perry v. Gross*, 172 Cal. 468, 156 Pac. 1031.

13. *Perry v. Gross*, 172 Cal. 468, 156 Pac. 1031; *Neale v. Morrow*, 150 Cal. 414, 88 Pac. 815; *Martin v. Hill*, 2 Cal. Unrep. 310, 403, 3 Pac. 861, 4 Pac. 1101 (agreement by parties to partition suit permitting them to acquire title to lands in their possession).

14. *Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121.

15. *Sprague v. Edwards*, 48 Cal.

239 (reading the right word in place of wrong one in contract, the result of clerical error); *Hancock v. Watson*, 18 Cal. 137.

16. *Perry v. Gross*, 172 Cal. 468, 156 Pac. 1031.

17. *Harre'son v. Miller & Lux*, 182 Cal. 408, 188 Pac. 800 (holding intent was shown to execute lease and not cropping contract).

18. *Stockton Sav. & L. Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561.

it are fully detailed.¹⁹ It is familiar law that an instrument, though in the form of an absolute conveyance, constitutes and will be treated as a mortgage, if in fact it was given as security for the performance of an obligation.²⁰ Calling a contract a lease or a sale will not make it such.¹

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."² The proper construction, therefore, is dependent upon the entire body of the contract and its legal effect as a whole.³ Contracts entered into for the mutual material benefit of the parties are to be so construed as not to defeat these objects when such construction is reasonably deducible from their terms.⁴ And in the face of conflicting testimony, evidence is admissible to show the real nature of a contract.⁵

19. *Godeffroy v. Caldwell*, 2 Cal. 489, 56 Am. Dec. 360.

20. *Boal v. Gassen*, 178 Cal. 132, 172 Pac. 588; *Hodgkins v. Wright*, 127 Cal. 688, 60 Pac. 431; *Lee v. Evans*, 8 Cal. 424. See DEEDS; MORTGAGES.

1. *Lundy Furniture Co. v. White*, 128 Cal. 170, 79 Am. St. Rep. 41, 60 Pac. 759; *Stockton Sav. & L. Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561; *Parke & Lacy Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442; *Kohler v. Hayes*, 41 Cal. 455; *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124; *Hogan v. Anthony*, 40 Cal. App. 679, 182 Pac. 52 (contract for conditional sale of personalty). See LANDLORD AND TENANT; SALES.

2. Civ. Code, § 1648; *Brookshire Oil Co. v. Casmalia Ranch Oil etc. Co.*, 156 Cal. 211, 103 Pac. 927 (lease of oil lands); *Ames v. Southern Pac. Co.*, 141 Cal. 728, 99

Am. St. Rep. 98, 75 Pac. 310; *California Packing Corp. v. Larsen*, 33 Cal. App. Dec. 765; *MacFarland v. Walker*, 40 Cal. App. 508, 181 Pac. 248 (quitclaim deed); *Henne v. Summers*, 16 Cal. App. 67, 116 Pac. 86; *Alvey v. Continental Ins. Co.*, 2 Cal. App. 253, 83 Pac. 285; *Parish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694; sustained in 140 Cal. 635, 74 Pac. 312 (contract of guaranty).

3. *Stockton Savings & Loan Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561. See *infra*, § 165.

4. *Daniel v. Calkins*, 31 Cal. App. 514, 160 Pac. 1082.

5. *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202; sustaining 3 Cal. Unrep. 418, 27 Pac. 286 (holding evidence admissible to show contract written on sheet of paper upon which appeared the rules of the produce exchange was

When the language of a contract is not absolute, the intention is to be ascertained by a consideration of the situation of the parties, and the character and condition of the subject matter thereof.⁶ "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."⁷ And although parol evidence is not admissible to supply omissions or introduce terms, or to contradict, alter or vary a written instrument, it is admissible for the purpose of identifying the subject matter to which the writing refers.⁸

§ 165. Construction of Entire Contract.—Contracts are construed as entireties. The intention of the parties is gathered from the whole instrument, taking it by its four corners; that intention may be expressed anywhere in the instrument and by any words.⁹ Or, as the rule has been

an exchange contract, and to show what the rules of the exchange board were).

6. *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491; *Veerkamp v. Hulburd*, *Canning & D. Co.*, 58 Cal. 229, 41 Am. Rep. 265; *Brannan v. Mesick*, 10 Cal. 95; *Leventritt v. Cowell*, 21 Cal. App. 597, 132 Pac. 627; *King v. Samuel*, 7 Cal. App. 55, 93 Pac. 391.

7. Civ. Code, § 1647; *MacFarland v. Walker*, 40 Cal. App. 508, 181 Pac. 248 (grant); *Bonslett v. Butte County Canal Co.*, 18 Cal. App. 149, 122 Pac. 821; *Johnson v. Levy*, 3 Cal. App. 591, 86 Pac. 810; *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694; sustained in 140 Cal. 635, 74 Pac. 312 (contract of guaranty).

8. *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885; *Ontario D. F. G. Assn. v. Cutting F. P. Co.*, 134 Cal. 21,

66 Pac. 28 (sale of certain quantity of fruit from "sundry orchards"); *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964 (quoting Benjamin on Sales); *Towle v. Carmelo Land & Coal Co.*, 99 Cal. 397, 33 Pac. 1126; *Preble v. Abrahams*, 88 Cal. 245, 22 Am. St. Rep. 301, 26 Pac. 99; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Swain v. Grangers' Union*, 69 Cal. 186, 10 Pac. 404; *Security Inv. Co. v. Bartram*, 36 Cal. App. Dec. 399.

9. *Nakagawa v. Okamoto*, 164 Cal. 718, 130 Pac. 707 (promissory notes held to have been intended by way of penalty or forfeiture); *Seudder v. Perce*, 159 Cal. 429, 114 Pac. 571; *Montgomery v. De Picot*, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305 (holding provision for conveyance by defendants of property to "said party of the second part, his heirs, executors and assigns," upon the fulfillment of certain conditions by him or his "heirs, executors or assigns," general and

otherwise expressed: "It is a true and important rule of construction that the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus*; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done."¹⁰ It is the duty of the court to so construe a written instrument as to give force and effect, not only to every clause but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the parties, to be collected from its terms, or would lead to some absurdity.¹¹ It has been frequently said, and it is a code rule, that every part of a contract should be given some effect.¹² Each clause is to be considered

not conclusive upon subject of assignability); *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917 (executory contract of sale); *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257 (conditional sale of mining stock); *Gray v. La Societe Francaise etc.*, 131 Cal. 566, 63 Pac. 848; *Perkins v. Mettler*, 126 Cal. 100, 58 Pac. 384 (conditional sale of merchandise); *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189 (insurance policy); *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448 (conditional sale—title reserved); *Serrano v. Rawson*, 47 Cal. 52 (land patent); *Brannan v. Mesick*, 10 Cal. 95; *Harter v. Delno*, 33 Cal. App. Dec. 452, 194 Pac. 300 (contract of sale—provision for retention of title considered as inserted for security only); *Sledge v. Stolz*, 41 Cal. App. 209, 182 Pac. 340 (deed); *MacFarland v. Walker*, 40 Cal. App. 508, 181 Pac. 248 (land grant); *Farnham v. Huston*, 39 Cal. App. 687, 179 Pac. 701 (deed); *East San Mateo Land Co.*

v. Southern Pac. R. R. Co., 30 Cal. App. 223, 157 Pac. 634 (deed of railroad right of way); *Gray v. Maier & Zobelein Brewery*, 2 Cal. App. 653, 84 Pac. 280 (holding option to renew lease given to "party of first part," who was lessor, should be read, "party of second part," or lessee, when such reading only would give it meaning); *Remy v. Olds*, 4 Cal. Unrep. 240, 34 Pac. 216.

10. *Balfour v. Fresno C. & Irr. Co.*, 109 Cal. 221, 41 Pac. 876 (quoting *Broome's Legal Maxims*).

11. *Scudder v. Perce*, 159 Cal. 429, 114 Pac. 571; *Faivre v. Daley*, 93 Cal. 664, 29 Pac. 256 (deed); *Hyatt v. Allen*, 54 Cal. 353; *Havens v. Dale*, 18 Cal. 359.

12. Civ. Code, § 1641; *French v. Farmer*, 178 Cal. 218, 172 Pac. 1102 (construing contractor's bond); *Savage v. Smith*, 170 Cal. 472, 150 Pac. 353; *McCampbell v. Obear*, 27 Cal. App. 97, 148 Pac. 942 (contract of guaranty); *Welch v. British-American Assur. Co.*, 148 Cal. 223, 113

with reference to every other clause upon which it has any bearing, and all the clauses and provisions are to be construed together as the unified medium whereby the intent of the parties is to be reached.¹³ The reason of this rule is, that the same parties make all the contract, and may be supposed to have the same purpose in view in all of it; and if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others.¹⁴

The rule under discussion is laid down by the codes. Section 1641 of the Civil Code provides that "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."¹⁵ Section 1858 of the Code

Am. St. Rep. 223, 7 Ann. Cas. 396, 82 Pac. 964 (applying rule in construing mortgage clause in insurance policy); *Mickle v. Sanchez*, 1 Cal. 200 (contract of guaranty).

13. *Anderson v. Quick*, 163 Cal. 658, 128 Pac. 871 (construction contract—provisions for apportionment of loss); *Jones v. Van Nuys*, 161 Cal. 158, 118 Pac. 541 (grant of water flowing from wells); *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787 (contract to furnish oil—excuses for nonperformance); *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603 (trust deed); *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362; *Gero v. Bichey*, 38 Cal. App. 21, 175 Pac. 91 (sale of land—price payable in installments).

14. *Brannen v. Mesick*, 10 Cal. 95 (quoting *Parsons on Contracts*).

15. *C. M. Staub Shoe Co. v. Byrne*, 169 Cal. 122, 145 Pac. 1032 (lease); *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933 (contract for street improvement); *Pavkovich v. Southern Pac. R. R. Co.*, 150 Cal. 39, 87 Pac. 1097 (deed

of quarry and right of way thereto); *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362 (property settlement between husband and wife); *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049 (deed construed to convey life estate only); *Pellisier v. Corker*, 103 Cal. 516, 37 Pac. 465 (grant of easement); *Humboldt Savings etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920 (bond of corporation officer); *Hughes v. Scott*, 32 Cal. App. Dec. 75, 190 Pac. 643 (deed); *Lang v. Pacific Brewing & Malting Co.*, 30 Cal. App. Dec. 758, 59 Cal. Dec. 161, 187 Pac. 81 (lease); *Nathan v. Porter*, 36 Cal. App. 356, 172 Pac. 170 ("net proceeds" as used in modifying clause interpreted to mean net profits); *Roughton v. Brookings Lumber & Box Co.*, 26 Cal. App. 752, 148 Pac. 539 (contract for installation of automatic fire-extinguishers); *Griffin v. Long*, 21 Cal. App. 308, 131 Pac. 760 (contract for sale of mining property); *Archer v. Lewis*, 19 Cal. App. 135, 124 Pac. 859 (agreement for sale of land); *Bonslett v. Butte*

of Civil Procedure, referring to the interpretation of contracts, provides that "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."¹⁶ Thus the rules of construction forbid seizing upon some isolated provision of a contract in order to compel a certain result.¹⁷ The whole of the context must be considered to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause.¹⁸ Nor, is it the name parties may give to their contract which determines its character. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.¹⁹

§ 166. Preliminary Negotiations.—As a general rule, preliminary negotiations leading up to a contract, and not embodied in it, constitute no part of the final binding contract, and its legal effect cannot be changed by reference to them.²⁰ When the terms of an agreement have been reduced to writing, no evidence of other negotiations

County Canal Co., 18 Cal. App. 149, 122 Pac. 821 (sale of water); *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975 (lease of farm lands); *Henne v. Summers*, 16 Cal. App. 67, 116 Pac. 86 (bond to secure performance of lease); *Nelles v. MacFarland*, 9 Cal. App. 534, 99 Pac. 980 (agreement for compensation of insurance agent); *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71 (contract of agency for sale of realty); *Peterson v. Machado*, 5 Cal. Unrep. 273, 43 Pac. 611 (deed conveying right of way).

16. *Lassing v. James*, 107 Cal. 348, 40 Pac. 534 (contract for pasturage of cattle).

17. Civ. Code, §§ 1641, 1650; *Skookum Oil Co. v. Thomas*, 162

Cal. 539, 123 Pac. 363 (sale of land—provision for forfeiture).

18. *City of Stockton v. Weber*, 98 Cal. 433, 33 Pac. 332 (deed); *Brannan v. Mesick*, 10 Cal. 95 (deed).

19. *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917; *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257. And see *supra*, § 164.

20. *Union Oil Co. v. Pacific Surety Co.*, 182 Cal. 69, 187 Pac. 14; *Board of Education v. Grant*, 118 Cal. 39, 50 Pac. 5 (lease of school lots by city); *Drake v. Tucker*, 29 Cal. App. Dec. 692, 184 Pac. 502; *G. S. Johnson Co. v. Nevada Packard Mines Co.*, 272 Fed. 291.

or terms is admissible.¹ It must be presumed, in the absence of fraud, accident or mistake, that the entire negotiations of the parties are included in the contract as executed.² The written contract must control as to all the terms expressed in it; and if there is any difference between it and the oral agreement, the document must be referred to in order to determine the rights of the parties.³ Section 1625 of the Civil Code provides as follows:

“The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.”⁴

1. Civ. Code, §§ 1697, 1698; Code Civ. Proc., § 1856; *Fidelity & Casualty Co. v. Fresno Flume etc. Co.*, 161 Cal. 466, 37 L. R. A. (N. S.) 322, 119 Pac. 646 (policy of insurance); *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 Pac. 319 (applying rule where parol evidence showed intention to sell on a warranty by sample, but contract of sale was silent on the subject); *Board of Education v. Grant*, 118 Cal. 39, 50 Pac. 5 (lease of school lots by city); *Bradford Investment Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083 (agreement to protect security for obligation from deterioration); *Hudson v. Barneson*, 41 Cal. App. 633, 183 Pac. 274; *Baume v. Morse*, 13 Cal. App. 456, 110 Pac. 350 (applying rule to contract to sell real estate which failed to name the purchase price or sufficiently describe the property); *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938 (holding parol evidence inadmissible to vary terms of written option by showing time allowed for acceptance). See *Evi-*

DENCE for detailed discussion of admissibility of parol evidence to vary written instruments.

2. *United Iron Wks. v. Outer Harbor etc. Co.*, 168 Cal. 81, 141 Pac. 917; *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 Pac. 319; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, 6 L. R. A. 219, 22 Pac. 515 (contract to excavate and construct levee); *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529 (evidence inadmissible to show parol agreement that party signing note as trustee was not to be personally liable); *Osborne v. Elliott*, 1 Cal. 337 (contract for sale of ships); *Rottman v. Hevener*, 36 Cal. App. Dec. 358 (declaring rule applies to negotiable as well as to non-negotiable instruments); *Yuba Mfg. Co. v. Stone*, 39 Cal. App. 440, 179 Pac. 418 (sale of tractor—all warranties held included in written contract).

3. *Third Street Imp. Co. v. McLelland*, 23 Cal. App. 369, 137 Pac. 1089 (settlement of account).

4. *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808; *Lundeen v. Ottis*,

And section 1856 of the Code of Civil Procedure puts in statutory form a well-established rule of evidence in the following words:

“When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing.”⁵

164 Cal. 183, 128 Pac. 335 (agreement to pay broker commission for negotiating exchange of lands); Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 Pac. 369 (purchase of machinery); Pierce v. Edwards, 150 Cal. 650, 89 Pac. 600 (sale of lands); Bradford Investment Co. v. Joost, 117 Cal. 204, 48 Pac. 1083 (agreement to protect security for obligation from deterioration); McDonald v. Poole, 113 Cal. 437, 45 Pac. 702 (parol evidence not admissible to vary price agreed upon for street work); Beall v. Fisher, 95 Cal. 568, 30 Pac. 773 (exchange of lands); West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 Pac. 993 (lease of lands); Smith v. Taylor, 82 Cal. 533, 23 Pac. 217 (sale of land); Schurtz v. Romer, 82 Cal. 474, 23 Pac. 118 (sale of interest in partnership); Ackerman v. Channel Commercial Co., 85 Cal. App. Dec. 477, 199 Pac. 1101; Peterson v. Wagner, 34 Cal. App. Dec. 823, 198 Pac. 25 (sale of crop of hops); First Nat. Bank of Antioch v. Fickert, 34 Cal. App. Dec. 321, 196 Pac. 112 (citing authorities); Thomson v. Langton, 31 Cal. App. Dec. 139, 187 Pac. 970 (note and mortgage); De Laval Dairy Supply Co. v. Talbott, 38 Cal. App. 39, 175 Pac. 83 (sale of gas engine); Munn v. Earl C. Anthony, Inc., 36 Cal. App.

312, 171 Pac. 1082 (sale of automobile); Cyclops Iron Works v. Chio Ice etc. Co., 34 Cal. App. 10, 166 Pac. 821 (sale of ice cans); Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 Pac. 906 (purchase of automobile); Third Street Imp. Co. v. McLelland, 23 Cal. App. 369, 137 Pac. 1089 (settlement of account); Gladding, McBean & Co. v. Montgomery, 20 Cal. App. 276, 128 Pac. 790 (sale of roof tiling—evidence offered held to be in contravention to section 1625 of the Civil Code); Luitweller etc. Engine Co. v. Ukiah Water etc. Co., 16 Cal. App. 198, 116 Pac. 707, 712 (sale of pump); Dodd v. Pasch, 5 Cal. App. 686, 91 Pac. 166 (holding parol evidence not admissible to vary terms of lease by showing it was from month to month); Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948 (terms “about” and “more or less,” used in contract of sale of grapes, do not create such ambiguity as will justify admission of extrinsic evidence to show intention); Bullion & Exchange Bank v. Spooner, 4 Cal. Unrep. 531, 36 Pac. 121 (note and mortgage).

5. Heffner v. Gross, 179 Cal. 738, 178 Pac. 860 (agreement to resign position and to use influence for appointment of another); Lundeen v. Ottis, 164 Cal. 183, 128 Pac. 335

The rule that prior or contemporaneous negotiations cannot be used to contradict, add to, or vary, a written contract, applies not only to the letter of the document, but also to its legal effect, as, for example, where no time of performance is fixed, the law implies a reasonable time, and evidence that a specific time had been agreed upon is inadmissible.⁶ But section 1625 of the Civil Code has no application until after the contract in writing has been executed.⁷

Exceptions to rule.—There are, however, certain exceptions to the foregoing general rule.⁸ The terms of the written instrument which the parties signed will not prevail over their previous negotiations, if it should be shown that, by reason of fraud or mistake, it does not express their actual agreement.⁹ And it is proper for the court to admit testimony as to previous negotiations, where they are a part of the surrounding circumstances necessary to explain the contract.¹⁰ Evidence of the purpose of the

(agreement to pay broker commission for negotiating sale of lands); *Pierce v. Edwards*, 150 Cal. 650, 89 Pac. 600 (sale of lands—delivery of possession); *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773 (exchange of lands); *First Nat. Bank of Antioch v. Fickert*, 34 Cal. App. Dec. 321, 196 Pac. 112 (citing authorities); *J. I. Case Threshing Machine Co. v. Copren Bros.*, 32 Cal. App. 194, 162 Pac. 647 (sale of traction engine); *Third Street Imp. Co. v. McLelland*, 23 Cal. App. 369, 137 Pac. 1089 (settlement of account); *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948 (sale of grapes); *Bullion & Exchange Bank v. Spooner*, 4 Cal. Unrep. 531, 36 Pac. 121 (note and mortgage). And see *Goldman v. Davis*, 23 Cal. 256, decided prior to adoption of code, but stating rule). See EVIDENCE.

6. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938.

7. *Willey v. Clements*, 146 Cal. 91, 79 Pac. 850.

8. See *infra*, § 167.

9. *Code Civ. Proc.*, § 1856; *Board of Education v. Grant*, 118 Cal. 39, 50 Pac. 5 (lease of school lots by city); *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58 (decision of department in same case reported, 6 Cal. Unrep. 101, not sustained); *White v. Greenwood*, 35 Cal. App. Dec. 258, 199 Pac. 1095.

10. *Civ. Code*, § 1647; *Code Civ. Proc.*, §§ 1856, 1860; *J. & H. Goodwin, Ltd., v. Franich*, 37 Cal. App. 493, 174 Pac. 83 (when the defendants raised no objection to the limited purpose for which the testimony in question was admitted, they cannot be heard to complain on appeal); *Luitweiler etc. Engine*

agreement, and of the negotiations leading up to its execution, is admissible for the purpose of showing what the parties intended.¹¹ It is undoubtedly true as a legal proposition, that verbal as well as written declarations of a party to a transaction are admissible when they accompany some act, the nature, object or motive of which is the subject of inquiry, providing they are contemporaneous with the act to which they were intended to give character.¹² So, too, previous and contemporaneous transactions may properly be taken into consideration to ascertain the sense in which the parties used particular terms, or to ascertain the subject matter of the contract.¹³ It is also settled that proof of subsequent dealings, tending to show the meaning which the parties placed upon contract between them, is admissible.^{13a} The admission of parol evidence of conversations and prior negotiations is entirely without prejudice where it is in line and harmony with the written instrument itself.¹⁴

§ 167. Contemporaneous or Collateral Agreements.—

The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations does not apply where the parties have not incorporated into

Co. v. Ukiah Water etc. Co., 16 Cal. App. 198, 116 Pac. 707, 712 (sale of pump). And see Martin v. Stone, 15 Cal. App. 174, 113 Pac. 706 (holding evidence of conversations admissible as not varying terms of assignment).

See *infra*, § 180, as to surrounding circumstances as aid in interpretation of contracts.

11. Horton v. Winbigler, 175 Cal. 149, 165 Pac. 423 (deed); Owsley v. Matson, 156 Cal. 401, 104 Pac. 983 (deed); Roush v. Kirkman, 42 Cal. App. 115, 183 Pac. 353 (guaranty).

12. Code Civ. Proc. § 1850; Aguirre v. Alexander, 58 Cal. 21 (construing deed). See EVIDENCE.

13. Cabrera v. Thannhauser & Co., 183 Cal. 604, 192 Pac. 45; Lang v. Pacific Brewing & Malting Co., 30 Cal. App. Dec. 758, 59 Cal. Dec. 161, 187 Pac. 81; Fee v. McPhee Co., 31 Cal. App. 295, 160 Pac. 397 (quoting 17 Cyc. 671).

13a. Cabrera v. Thannhauser & Co., 183 Cal. 604, 192 Pac. 45.

14. Ruffin v. Becker, 27 Cal. App. 163, 148 Pac. 233 (contract of guaranty for payment of rent); Ruffin v. Lillienthal, 26 Cal. App. 701, 148 Pac. 233; Doran, Brouse & Price v. Henry Cowell Lime etc. Co., 37 Cal. App. 478, 174 Pac. 90 (contract for sale of cement, consisting of letters and telegrams).

the instrument all of the terms of their agreement. But the exception allowing oral evidence of terms of an agreement not included in a writing is itself subject to the qualification that the oral stipulations sought to be proved are not inconsistent with the written terms.¹⁵ And it has been intimated that the written portion must be sufficient evidence of the agreement of the parties to satisfy

15. *Union Oil Co. v. Pacific Surety Co.*, 182 Cal. 69, 187 Pac. 14; *Blahnik v. Small Farms Improvement Co.*, 181 Cal. 379, 184 Pac. 661; *Whittier v. Home Savings Bank*, 161 Cal. 311, 119 Pac. 92 (contract for street work); *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 95 Pac. 319 (parol evidence inadmissible to introduce into written contract for sale of fruit term warranting quality); *Pierce v. Edwards*, 150 Cal. 650, 89 Pac. 600 (sale of land); *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964 (majority holding written contract for sale cannot be varied by parol evidence that sale was by sample); *Williams v. Ashurst Oil etc. Co.*, 144 Cal. 619, 78 Pac. 28 (contract for shares of capital stock of corporation); *Richter v. Union Land etc. Co.*, 129 Cal. 367, 62 Pac. 39 (deed of water right); *Wolters v. King*, 119 Cal. 172, 51 Pac. 35 (agreement to pay broker for services in sale of land); *Bradford Investment Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083 (agreement to protect security for obligation from deterioration); *Savings Bank of Southern California v. Asbury*, 117 Cal. 96, 48 Pac. 1081 (agreement to loan amount of note and mortgage executed); *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571 (contract to pay money); *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109 (contract for construction

of city sidewalk); *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Howard v. Stratton*, 64 Cal. 487, 2 Pac. 263; *Scheimer v. James*, 35 Cal. App. Dec. 425, 199 Pac. 827 (holding admission of evidence, if error, was not prejudicial); *Hammond v. San Mateo Planing Mill Co.*, 30 Cal. App. Dec. 823, 31 Cal. App. Dec. 149, 187 Pac. 144 (contract of sale); *Tracy Brick & Art Stone Co. v. Wurster*, 30 Cal. App. Dec. 770, 187 Pac. 125 (evidence of warranties held admissible); *Hudson v. Barneson*, 41 Cal. App. 633, 183 Pac. 274 (contract for services of architect); *Stephan v. Lagerqvist*, 35 Cal. App. Dec. 85, 199 Pac. 52 (sale of restaurant); *Bruner v. Hegyi*, 42 Cal. App. 97, 183 Pac. 369 (contract to do tile work); *Simmons v. Firth*, 33 Cal. App. 187, 164 Pac. 807; *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820; *Webber v. Smith*, 24 Cal. App. 51, 140 Pac. 37 (allowing parol proof of contemporaneous parol agreement of purchaser of milk business to buy goodwill represented by milk routes); *Luitweiler etc. Engine Co. v. Ukiah Water etc. Co.*, 16 Cal. App. 198, 116 Pac. 707, 712 (sale of pump); *O'Brien v. Garibaldi*, 15 Cal. App. 518, 115 Pac. 249 (holding evidence tending to show consideration for acceptance of order could not have

the statute of frauds.¹⁶ It is sufficient to prevent the admission of evidence of a collateral oral agreement that the law completes the contract by clearly implied terms.¹⁷ However, the fact that the parties intended to reduce a parol agreement to writing, but failed to do so, does not affect the validity of the agreement nor place it in the light of an incomplete transaction.¹⁸

The test of the application of the general rule or of its exception to a given case is the completeness or incompleteness of the written contract; or, in other words, whether such contract contains all the terms of the agreement. With few exceptions, this question is to be determined from an inspection of the contract itself.¹⁹ In the leading case on the subject it is said:

“The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: ‘If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writ-

effect to modify or vary terms and conditions expressed in order on which acceptance was based); *Dodd v. Pasch*, 5 Cal. App. 686, 91 Pac. 166 (holding parol evidence inadmissible to vary terms of lease by showing lease from month to month). But see *Reese v. G. B. Amigo Co.*, 31 Cal. App. 450, 160 Pac. 837 (holding admission of evidence did not constitute variance of terms of writing by parol, but amounted to evidence of waiver of provision of contract upon part of defendant). See FRAUD AND DECEIT; SALES, as to admissibility of evidence as to oral representations and warranties.

16. *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689, 928.

17. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938 (parol evidence inadmissible to vary terms of written option by proof of oral agreement defendant should have one year from past date fixed in which to accept same in writing). See as to implied terms, *infra*, § 189.

18. *Webber v. Smith*, 24 Cal. App. 51, 140 Pac. 37. See, also, *supra*, § 33.

19. *Hudson v. Barneson*, 41 Cal. App. 633, 183 Pac. 274.

ing contains nothing on the particular one to which the parol evidence is directed.' ”²⁰

It has been declared, however, that “whether the writing contains the entire agreement is a question to be determined not merely from the face of the instrument, but from all the facts and circumstances connected with it, and is usually for the jury.”²¹

“Of course this exception to the general rule can be invoked and applied to a written instrument which *prima facie* purports to embody the complete legal obligations of the parties, only where the established circumstances surrounding and attending its execution warrant the inference that the parties did not intend that it should be a complete and final statement of the whole transaction before them. . . . The reason for the exception to the general rule is to be found in the fact that the exclusion of such evidence, when relevant to the issues joined in a given case, would operate to permit one of the parties to the written agreement to take an unjust advantage of the other by receiving all of the benefits accruing to him under the contract without assuming all of the burdens imposed upon him by the terms of the contract.”²²

§ 168. Construction in Favor of Validity.—As between two permissible constructions, that which establishes a valid contract is preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing.³ The parties

20. *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830 (quoting *Thompson v. Libbey*, 34 Minn. 374, 26 N. W. 1). This case is approved and quoted in the following: *Heffner v. Gross*, 179 Cal. 738, 178 Pac. 860; *Bradford Investment Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083; *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109; *Hudson v. Barneson*, 41 Cal. App. 633, 183 Pac. 274; *J. I. Case Threshing*

Mach. Co. v. Copren Bros., 32 Cal. App. 194, 162 Pac. 647. .

1. *Luitweiler etc. Co. v. Ukiah etc. Co.*, 16 Cal. App. 198, 116 Pac. 707, 712.

2. *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820, per *Lennon*, P. J.

3. *Pacific Wharf & Storage Co. v. Standard Amer. D. Co.*, 184 Cal. 21, 192 Pac. 847 (provision of contract void as in restraint of trade construed as independent condi-

are deemed to have intended a lawful, rather than an unlawful, act, and their agreement is to be construed, if possible, as intending something for which they had the power to contract.⁴ All intendments being against fraud and in favor of fair dealing, it will not be presumed against a writing that it contemplated a violation of the law, unless that conclusion becomes irresistible from the very reading of the instrument.⁵ Section 1643 of the Civil Code provides that

“A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.”

And section 3541, Civil Code, provides that, “an interpretation which gives effect is preferred to one which makes void.”⁶ So, in construing an agreement the court

tion); *Mebius & Drewcher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917 (purchase of salt); *McVicker v. McKenzie*, 136 Cal. 656, 69 Pac. 495 (illegality of agreement to make bid for assignee in insolvency at sale held not to attach to remainder of contract); *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788 (stipulation and order appointing referee); *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27 (sale of hides and tallow); *Saunders v. Clark*, 29 Cal. 299 (sale of realty); *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667 (bond given to secure performance of contract of lease); *Hammond v. Haskell*, 14 Cal. App. 522, 112 Pac. 575 (contract construed as valid sale of stock to defendants, to be delivered to corporation for their benefit, and not sale to corporation of own stock).

4. *Smith v. Luning Co.*, 111 Cal. 308, 43 Pac. 967 (contract for street improvement construed as im-

plying condition that permit would be secured).

5. *Estate of Wood*, 137 Cal. 129, 69 Pac. 900 (antenuptial contract held invalid).

6. *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933 (contract for improvement of highway); *Messer v. Hibernia Sav. etc. Society*, 149 Cal. 122, 84 Pac. 835 (exchange of lands); *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712 (deed); *McCloskey v. Tierney*, 141 Cal. 101, 99 Am. St. Rep. 33, 74 Pac. 699 (assignment of bank account); *Sutliff v. Seidenberg Steifel Co.*, 132 Cal. 63, 64 Pac. 131, 469 (agreement to pay for services in assisting distributing agents); *Sample v. Fresno Flume & Irr. Co.*, 129 Cal. 222, 61 Pac. 1085 (contract to furnish water in consideration of transfer of stock); *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788 (stipulation and order appointing referee); *Alaska Imp. Co. v. Hirsch*, 119 Cal. 249, 257,

will follow, where it is possible, that construction which prevents a failure of justice.⁷ It is not to be supposed that parties intended to violate the law any further than appears.⁸ Thus, where one construction involves the absolute destruction of the property right of alienation and another sustains such right and at the same time protects all parties from loss or injury, that construction should be given which would not forfeit property or property rights. And a provision involving a total forfeiture should yield to a provision involving only a partial forfeiture.⁹ If the stipulations of a contract are clearly severable, it is to be construed as void only as to the illegal portion, and valid as to the rest.¹⁰ Likewise, when a contract provides for doing a thing which may be, and generally is, done in a lawful manner, and is silent as to the mode

47 Pac. 124, 51 Pac. 340 (injunction bond); Oullen v. Sprigg, 83 Cal. 56, 23 Pac. 222 (deed); Lambert v. Haskel, 80 Cal. 611, 22 Pac. 327 (undertaking to continue injunction in force); Armstrong v. Sacramento Valley Realty Co., 34 Cal. App. Dec. 884, 198 Pac. 217; California Packing Corp. v. Grove, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of fruit); Frank v. Crescent Wharf & Warehouse Co., 33 Cal. App. Dec. 729, 195 Pac. 79 (charter-party); California Packing Corp. v. Grove, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of fruit crop); Lang v. Pacific Brewing & Malting Co., 30 Cal. App. Dec. 758, 187 Pac. 81 (lease); Weinreich Estate Co. v. A. J. Johnston Co., 28 Cal. App. 144, 151 Pac. 667 (bond to secure performance of lease); Birkel Co. v. Howze, 12 Cal. App. 645, 108 Pac. 145 (transfer of stock accompanied by repurchase agreement); Hickman-Coleman Co. v. Leggett, 10 Cal. App. 29, 100 Pac. 1072 (construing con-

tract as made by defendant personally rather than as executor of estate, where he had no power to bind estate); Guthrie v. Supreme Tent K. of M., 4 Cal. App. 184, 87 Pac. 405 (agreement of mutual benefit society to pay for "old age disability"); Daniels v. Daniels, 3 Cal. App. 294, 85 Pac. 134 (agreement that notes be delivered in escrow to be delivered to payees only upon death of maker or upon expiration of prescribed period of time).

7. Eldridge v. Mowry, 24 Cal. App. 183, 140 Pac. 978 (contract to quiet or restore title; compensation).

8. McVicker v. McKenzie, 136 Cal. 656, 69 Pac. 495.

9. Dollar v. International Banking Corp., 10 Cal. App. 83, 101 Pac. 34.

10. Civ. Code, § 1599; McVicker v. McKenzie, 136 Cal. 656, 69 Pac. 495. See *supra*, § 105, as to partial illegality of contracts.

of doing it, the contract is to be construed as requiring it to be done lawfully.¹¹

§ 169. Reasonableness of Construction.—A contract must receive such interpretation as will make it reasonable.¹² Where one construction would make the contract unreasonable, unfair or unusual and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter is the one which should be adopted.¹³ Indeed, it must be presumed that the parties intended the contract to be reasonably construed.¹⁴ Thus an agreement by one party, in consideration of the purchase of land and the furnishing

11. *Aston v. Nolan*, 63 Cal. 269 (contract by coterminous land owner for excavation of lot). See *supra*, § 62.

12. Civ. Code, § 1643 (quoted *supra*, § 168); *Humboldt M. Co. v. Northwestern Pac. Ry. Co.*, 166 Cal. 175, 135 Pac. 503; *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919 (sale of trees); *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 Pac. 496; *Armstrong v. Sacramento Valley Realty Co.*, 34 Cal. App. Dec. 884, 198 Pac. 217; *Daniels v. Daniels*, 3 Cal. App. 294, 85 Pac. 134; *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694, sustained, 140 Cal. 635, 74 Pac. 312.

13. *Stoddart v. Golden*, 179 Cal. 663, 3 A. L. R. 1060, 178 Pac. 707 (promissory note); *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536 (sale of half interest in land); *Coleman v. Commins*, 77 Cal. 548, 20 Pac. 77 (assignment of mortgage to mortgagor by way of mortgage to secure advances to the mortgagee); *Van Demark v. California Home Extension Assn.*, 30 Cal. App. Dec. 269, 185 Pac. 866 (sale of

land; provision for repurchase); *Jacoby v. Peck*, 23 Cal. App. 183, 137 Pac. 264 (one who contracts with the lessees of certain premises to pay them a stipulated sum monthly for the remainder of their term in consideration of their transferring their interest to the owners of the property, and securing from them a lease direct to him for which the owners are to receive an additional rental, is released from his obligation to the original lessees on the destruction of the premises by fire prior to the expiration of the term); *Whitney v. Aronson*, 21 Cal. App. 9, 130 Pac. 700 (covenant in lease of office building that lessor would furnish heat during "winter months" construed to mean "cold season"); *Belden v. Farmers etc. Bank*, 16 Cal. App. 452, 118 Pac. 449 (lease of farm); *Johnson v. Levy*, 3 Cal. App. 591, 86 Pac. 810 (lease of livery-stable).

14. *Hettinger v. Thiele*, 15 Cal. App. 1, 113 Pac. 121 (construing provision of building contract with reference to apportionment of loss in event of destruction of uncompleted building).

of means for its improvement by another, and of a share in the profits, to "devote his whole time and attention to the management, care, cultivation and improvement of said land, and the sale of said land and products thereof," is not to be construed as requiring that the manager should positively remain on the land all of the time, and is not broken by occasional short absences.¹⁵ Nor, it has been held, does an agreement between the owners of a market and the renter of a stall therein giving the latter the right to sell his interest in the stall upon condition that the purchaser pay a monthly rental, make the right of sale dependent upon the suitability of the purchaser, except as to payment of rent, if that be classed as suitability.¹⁶ And it has been decided that a mere agreement to furnish board and lodging does not necessarily include nursing.¹⁷ A provision of a contract with commission agents that it was to be void if other identical contracts did not exist between the agents and other parties named is not to be interpreted as referring to contracts which were literally identical, but to such as were substantially identical in matters pertaining to the purpose and terms of the contract.¹⁸ A contract employing a superintendent of a smelting plant for a period of years and providing, in addition to a fixed salary, for the payment of a bonus on each ton of ore smelted cannot be construed, in the absence of express provision, to require the continuous operation of the establishment, or for any specified portion of the time.¹⁹ Similarly, a contract to furnish the refuse of a box factory as fuel for an electric plant does not obligate the owner of the factory to operate it merely for the sake of producing such refuse.²⁰ The fact that estimates of the quanti-

15. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

16. *Herman v. Rohan*, 37 Cal. App. 678, 174 Pac. 349.

17. *Sowash v. Emerson*, 32 Cal. App. 13, 161 Pac. 1018.

18. *Bernard v. Sloan*, 2 Cal. App. 737, 84 Pac. 232.

19. *Desormaux v. Meader*, 1 Cal. Unrep. 400.

20. *Loyalton etc. Co. v. California etc. Co.*, 23 Cal. App. 358, 137 Pac. 1099.

ties of material required for construction work, as made by an engineer, are stated in the notice, bid and specifications, the contractor "to furnish the materials," does not require that the builders buy or pay for a fixed and definite number of tons and cubic yards of the materials so estimated, regardless of whether used in the work or not; they are only under obligation to pay for the materials actually used in the work.¹ Where the contracting parties stipulated for the manufacture and delivery of iron girders "to be put in place within forty-six days," it was held that it was manifestly the intention of the parties that the girders should be made of the best quality of pig iron obtainable in the markets of the state; that it was not the duty of the contractor to procure it elsewhere.² A contract by which a furniture dealer is to install furniture in an apartment house, to be left until the house should be leased or sold, and the furniture sold, such dealer having control of the house in the meantime, does not give him an interest in the realty.³ It has been said that it can scarcely be a reasonable construction of a contract which would or might award to the contractor less pay for the most expensive and difficult part of the work than he is to receive for the less expensive portions.⁴

§ 170. Language of Instrument.—It is provided by section 1638 of the Civil Code that,

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."⁵

1. *Hackett v. State*, 103 Cal. 144, 37 Pac. 156.

2. *Savage v. Sweeney*, 2 Cal. Unrep. 138; affirmed, 63 Cal. 340.

3. *Roberts v. Colyear*, 179 Cal. 669, 180 Pac. 937.

4. *McGlynn v. Central R. R. Co.*, 1 Cal. Unrep. 464.

5. *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808 (sale of land); *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363 (optional contract for purchase of land); *Johnson v. Southern Pacific R. R. Co.*, 154 Cal. 285, 97 Pac. 520 (lease of railroad); *Hawley v. Brumagim*,

And the rule is established, not only by the authorities, but also by the code, that "when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. . . ."

In the absence of any evidence to the contrary, the instrument stands as an exponent of the facts therein set out, and the terms and legal effect of the contract are to be determined by an inspection of the instrument.⁷ The court cannot be aided by the declarations of the par-

33 Cal. 394 (decided prior to enactment of code but recognizing rule); *Halfhill Tuna Packing Co. v. Fishermen's Exchange Subscribers*, 33 Cal. App. Dec. 702, 195 Pac. 68 (construing policy insuring vessel against fire loss); *Conlin v. Southern Pac. Ry. Co.*, 40 Cal. App. 733, 182 Pac. 67 (deed of railroad right of way); *Betts v. Orton*, 34 Cal. App. 397, 167 Pac. 1147 (promissory note); *Suhr v. Metcalfe*, 33 Cal. App. 59, 164 Pac. 407 (agreement by building contractor to turn over building free from liens); *East San Mateo L. Co. v. Southern Pac. R. Co.*, 30 Cal. App. 223, 157 Pac. 634 (deed of railroad right of way); *Bonslett v. Butte County Canal Co.*, 18 Cal. App. 149, 122 Pac. 821; *Coalinga etc. Co. v. Associated Oil Co.*, 16 Cal. App. 361, 116 Pac. 1107 (lease of oil lands); *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71 (contract of agency for sale of land); *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220 (private contract for street improvement); *Tulare I. Dist. v. Kaweah etc. Co.*, 5 Cal. Unrep. 330, 44 Pac. 662 (sale by corporation of its property); *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694, sustained, 140 Cal. 635, 74 Pac. 312 (contract of guaranty).

6. Civ. Code, § 1639; *Payne v. Commercial Nat. Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007; *Cutten v. Pearsall*, 146 Cal. 690, 81 Pac. 25 (agreement to pay commission for sale of land); *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189 (insurance policy); *New Richmond Land Co. v. Ivanovich*, 34 Cal. App. Dec. 973, 198 Pac. 221; *Halfhill Tuna Packing Co. v. Fishermen's Exchange Subscribers*, 33 Cal. App. Dec. 702, 195 Pac. 68 (policy insuring vessel against fire loss); *White v. Greenwood*, 40 Cal. App. 113, 180 Pac. 45; *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667; *Griffin v. Long*, 21 Cal. App. 308, 131 Pac. 760; *Bonslett v. Butte County Canal Co.*, 18 Cal. App. 149, 122 Pac. 821; *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694; sustained, 140 Cal. 635, 74 Pac. 312 (contract of guaranty); *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 31 Pac. 367 (purchase of saw-logs).

7. *Carpenter v. Shinnars*, 108 Cal. 359, 41 Pac. 473 (tax deed); *Bensley v. Atwill*, 12 Cal. 211; *Newsom v. Woollacott*, 5 Cal. App. 722, 91 Pac. 347 (contract for services of architect).

ties as to their understanding of the meaning and construction of the terms.⁸ Parties will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected, which gives a broader interpretation to specific words than their literal meaning would bear.⁹ The language is indicative of the intent or thought in the minds of the parties.¹⁰

Accordingly, it is the duty of the court to construe the contract in such a way as to render it effectual to carry out the purpose of the parties, as expressed in the language and terms which they used.¹¹ Moreover, the terms sought to be enforced must be ascertained from the instrument itself and not from the construction put upon it by the pleading demanding its enforcement.¹² Words and sentences should be construed to make sense and reason.¹³

Whether construed according to its terms or in the light of the circumstances surrounding the making of the same, a contract should be interpreted in accordance with the plain import of the language used therein,¹⁴ rather than according to its strict legal sense,¹⁵ unless an intent

8. *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Platt v. Jones*, 43 Cal. 219; *Verzan v. McGregor*, 23 Cal. 339; *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 31 Pac. 367.

9. *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694; sustained, 140 Cal. 635, 74 Pac. 312 (policy of fire insurance).

10. *Brickell v. Bachelder*, 62 Cal. 623 (mortgage and note); *Wellman v. Conroy*, 33 Cal. App. Dec. 604, 606, 194 Pac. 728 (holding language of parties compelled conclusion that they intended contract of lease with option to purchase the property).

11. *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep.

64, 58 Pac. 164 (contract of guaranty); *Callahan v. Stanley*, 57 Cal. 476 (lease of land).

12. *Durst v. Jolly*, 35 Cal. App. 184, 169 Pac. 449 (lease).

13. Civ. Code, § 1644; *Lang v. Pacific Brewing & Malting Co.*, 59 Cal. Dec. 161, 187 Pac. 81 (lease).

14. *Scudder v. Perce*, 159 Cal. 429, 114 Pac. 571 (partnership agreement); *Vollmer v. Wheeler*, 42 Cal. App. 1, 183 Pac. 264 (agreement between tenants in common as to sale of land).

15. Civ. Code, § 1644; *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of crop of fruit).

that it should be construed otherwise plainly appears.¹⁶ It is not necessary that parties should express themselves in the most technical and precise terms; it is sufficient if their meaning clearly appears.¹⁷ Nor is it necessary that the contract should expressly indicate a local, technical, or peculiar signification. It may be shown by evidence that the language is used in a technical, local or peculiar sense.¹⁸ But the language used governs interpretation only so far as it is clear and explicit and does not involve an absurdity.¹⁹ Language involving an absurdity is to be rejected, and so is any phrase or clause which is inconsistent with the object and intention of the parties.²⁰ It is settled by the decisions and is declared by the code, that when, from fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded.¹

Punctuation, at best a most fallible guide, is always subordinate to the text and is never allowed to control its meaning.²

16. *Scudder v. Perce*, 159 Cal. 429, 114 Pac. 571.

17. *Buxton v. International Indemnity*, 32 Cal. App. Dec. 317, 191 Pac. 84 (insurance contract).

18. *Higgins v. California Petroleum etc. Co.*, 120 Cal. 629, 52 Pac. 1080 (construing Code Civ. Proc., § 1861); *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948 (holding that the rules stated in sections 1860 and 1861 of the Code of Civil Procedure, with reference to parol evidence, do not apply where the terms used in the contract are free from ambiguity or are not used in a technical, local or peculiar signification). See, also, Code Civ. Proc., § 1857, providing that "The language

of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place."

19. Civ. Code, § 1638; *Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156; *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788.

20. Civ. Code, §§ 1650, 1652, 1653; *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788.

1. Civ. Code, § 1640; *Messer v. Hibernia Sav. etc. Society*, 149 Cal. 122, 84 Pac. 835 (exchange of land). See *supra*, § 163.

2. *Stoddart v. Golden*, 179 Cal. 663, 3 A. L. R. 1060, 178 Pac. 707. See, also, note, 3 A. L. R. 1062.

§ 171. **Ambiguities.**—It is no part of the office of construction to add to a contract or take from it; its office is solely to ascertain what the parties intended by what they have said. If there be no ambiguity, the contract must speak for itself; in other words, there is no room for interpretation.³ Accordingly, where there is nothing ambiguous in the terms, nor any facts alleged which create an extrinsic ambiguity, extrinsic evidence to control or explain the meaning of the language is inadmissible.⁴

3. Civ. Code, §§ 1625, 1638; Code Civ. Proc., § 1858; *Southern Pac. Co. v. Spring Valley W. Co.*, 173 Cal. 291, 159 Pac. 865 (holding intention of parties clearly ascertainable from contract); *Humboldt M. Co. v. Northwestern Pac. Ry. Co.*, 166 Cal. 175, 135 Pac. 503 (contract for shipment of lumber at specified rate); *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 Pac. 876 (sale of water rights for irrigation of land); *San Diego Flume Co. v. Chase*, 87 Cal. 561, 25 Pac. 756, 26 Pac. 825 (contract to supply water for irrigation); *Lamb v. Otto*, 34 Cal. App. Dec. 544, 197 Pac. 147 (sale of automobile); *Terry v. Southwestern Bldg. Co.*, 30 Cal. App. Dec. 41, 185 Pac. 212 (contractor's bond); *White v. Greenwood*, 40 Cal. App. 113, 180 Pac. 45 (exchange of ranch and personal property); *George J. Birkel Co. v. Lovell*, 33 Cal. App. 744, 166 Pac. 594 (conditional sale of piano); *Millet v. Taylor*, 26 Cal. App. 161, 146 Pac. 42 (lease of farm); *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975 (lease of land for sugar beets); *Grosse v. Barman*, 9 Cal. App. 650, 100 Pac. 348 (evidence of surrounding circumstances, as bearing upon intention of parties held properly excluded); *Dodd v. Pasch*, 5 Cal.

App. 686, 91 Pac. 166 (holding error to allow evidence that tenancy was from month to month); *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948 (contract for sale of grapes); *Hale Bros. Inc. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365 (contract for delivery of structural steel). And see *supra*, § 162.

4. Civ. Code, § 1639; Code Civ. Proc., §§ 1856, 1860; *Ohio Elect. Car Co. v. Le Sage*, 182 Cal. 450, 188 Pac. 982 (guaranty); *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808 (holding that section 1860 of the Code of Civil Procedure and section 1647 cannot be invoked when there is no extrinsic ambiguity); *Pierce v. Merrill*, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64 (guaranty of debt of corporation); *New Richmond Land Co. v. Ivanovich*, 34 Cal. App. Dec. 973, 198 Pac. 221; *Coalinga etc. Co. v. Associated Oil Co.*, 16 Cal. App. 361, 116 Pac. 1107 (lease of oil lands); *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220 (private contract for grading). And see *Youngberg v. South End Warehouse Co.*, 177 Cal. 504, 171 Pac. 97 (holding that even though evidence was improperly admitted, since there was no ambiguity, its admission was an immaterial error). See *supra*, § 162.

The provisions of the Civil Code relative to the interpretation of doubtful contracts are not applicable to the clear and explicit terms of a contract freely entered into without any attendant circumstances of fraud, mistake or accident.⁵ But the provisions of section 1856 of the Code of Civil Procedure authorize the admission of evidence to explain an extrinsic ambiguity, and where the intention of the parties can be ascertained by merely following the rules governing the interpretation of contracts, it cannot be held that a contract is void for ambiguity.⁶ If the language employed be fairly susceptible of either one of two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then a latent ambiguity arises, and resort may be had to extrinsic evidence for the purpose of explaining, and the court, for the purpose of ascertaining the intention of the parties, should resort to the rules prescribed by the code. This, it has been explained, is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties.⁷ And if the lan-

5. *Halfhill Tuna Packing Co. v. Fishermen's Exchange Subscribers*, 33 Cal. App. Dec. 702, 195 Pac. 68 (policy insuring vessel against fire loss); *Grosse v. Barnum*, 9 Cal. App. 650, 100 Pac. 348 (lease of building).

6. *Caldwell v. Western Development Co.*, 36 Cal. App. Dec. 574, 201 Pac. 158.

7. Civ. Code, § 1637; Civ. Code, § 1860; *Payne v. Neuval*, 155 Cal. 46, 99 Pac. 476 (grant of incorporeal hereditament); *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, 96 Pac. 319 (sale of dried fruit by sample); *Millet v. Taylor*, 26 Cal.

App. 161, 146 Pac. 42 (lease of farm); *Williams v. Ashurst Oil Co.*, 144 Cal. 619, 78 Pac. 28; *Higgins v. California Petroleum Co.*, 120 Cal. 629, 52 Pac. 1080 (lease of land for purpose of extracting bituminous rock and asphalt); *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689, 928; *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 Pac. 876 (sale of water rights for irrigation of land); *Griffin v. Long*, 21 Cal. App. 308, 131 Pac. 760 (sale of mine); *Whitney v. Aronson*, 21 Cal. App. 9, 130 Pac. 700 (holding parol evidence admissible to show that "winter months" as used in

guage is fairly susceptible of two interpretations, either of which is within the spirit of the contract, it has been declared, one party is not at liberty to say that the other was not justified in acting upon either, or that he should have acted upon one rather than the other.⁸

For the purpose of determining what the parties intended by the language used, it is competent to show, not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown.⁹ Of course, where the language is not altogether free from ambiguity as to its meaning, it must not be given an interpretation which would involve an absurdity.¹⁰ The terms "about" and "more or less" have frequently found their way into contracts, and it has been held that such words introduce no ambiguity and that extrinsic evidence of previous or contemporaneous conversations is not admissible to show what the parties meant by their use, unless the contract, on its face, makes reference to some independent circumstances to identify the reference.¹¹

There is some authority for the proposition that a patent ambiguity appearing in a written contract cannot be cured by parol evidence.¹² The later cases, however,

covenant of lessor to furnish heat for leased premises meant "cold season"); *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948. See EVIDENCE.

8. *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164 (citing section 1654 of the Civil Code).

9. Code Civ. Proc., §§ 1860, 1861; *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 Pac. 876.

10. *Golden v. Fischer*, 27 Cal.

App. 271, 149 Pac. 797. See, also, *supra*, § 170.

11. *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948. See DEEDS.

12. *Mesick v. Sunderland*, 6 Cal. 298; (In this case the court quotes and recognizes as correct the distinction drawn by Lord Bacon, between latent and patent ambiguities, to the effect that only the former and not the latter may be cured by parol evidence); *Brannan v. Mesick*, 10 Cal. 95.

show an inclination to regard the classification of ambiguities into patent and latent as artificial and technical.¹³ Nevertheless, it is recognized that a patent ambiguity may be of such a character as to render a contract absolutely void and unenforceable.¹⁴

§ 172. Repugnancies.—Since every part of a contract must be given some effect if possible, provisions apparently conflicting must be reconciled if this may be done without doing actual violence to the language of the contract.¹⁵

“Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract.”¹⁶

Standing alone, two provisions may be wholly inconsistent, whereas read together, and in the light of the circumstances under which the contract was made, and the

13. *O'Connor v. West Sacramento Co.*, 35 Cal. App. Dec. 857 (reviewing the authorities). Referring to the distinction drawn by Lord Bacon between latent and patent ambiguities, a well-known writer says: “This rule has been applied to written contracts. But it is chiefly in regard to wills that the maxim has given trouble. Certainly, so far as contracts are concerned, it may be wholly disregarded. It was always, and still is, as Professor Thayer has said, ‘An unprofitable subtlety.’” 2 Williston on Contracts, p. 1210.

See "Erratum," 1926 Supp 4-56 14. *Payne v. Com. Nat. Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007.

15. *Royal Ins. Co. v. Caledonian Ins. Co.*, 20 Cal. App. 504, 129 Pac. 597 (insurance policy).

16. Civ. Code, § 1652; *Todd v. Superior Court of San Francisco*, 181 Cal. 406, 7 A. L. R. 938, 184 Pac. 684; *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981 (holding grant absolute and refusing inconsistent construction of particular clause contended for); *De La Cuesta v. Armstrong Holdings Co.*, 32 Cal. App. Dec. 801, 192 Pac. 135; *Kelly v. Great Western Acc. Ins. Co.*, 31 Cal. App. Dec. 927, 189 Pac. 785 (parenthetical clause on promissory note disregarded as contradictory to express terms of note as signed); *Rosenthal v. Bauer*, 30 Cal. App. 277, 157 Pac. 1137 (guaranty); *Henne v. Summers*, 16 Cal. App. 67, 116 Pac. 86 (bond to secure performance of lease); *Pacific Mutual Life Ins. Co. v. Pacific Surety Co.*, 182 Cal. 555, 189 Pac. 273 (reinsurance contract).

situation of the parties, they may harmonize.¹⁷ Inconsistent words are to be rejected.¹⁸ And a repugnant clause will even sometimes be wholly rejected in order to accomplish the positive and obvious general purpose.¹⁹ In many instances words have been supplied which were obviously necessary to give effect to the intention of parties.²⁰ And when it can be seen on the face of the instrument that the wrong word has been inadvertently used, and that another was intended, the latter may be substituted. But to justify such an amendment it must appear upon the face of the contract that the words used by the parties are unsusceptible of a reasonable construction, or inconsistent with the main intention of the parties; or that the substituted word is in fact the word, or the equivalent of the word, intended.¹ Particular words and phrases in a contract may, for the sake of interpretation, be rightly rejected only when they are inconsistent with its apparent purpose and the obvious intent of the parties.² If two clauses are so wholly repugnant to each other that they cannot stand together, the first should be received and the latter rejected.³ And if there are several articles, and if to attach a clause of one article to another article would make the article to which it is attached contradictory, such clause will be held applicable only to the article in which it is found.⁴

17. *De La Cuesta v. Armstrong Holdings Co.*, 32 Cal. App. Dec. 801, 192 Pac. 135 (option to purchase real property or sell same to third party providing for payment of commission in either case).

18. See *infra*, § 175.

19. *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981; *Jackson v. Puget Sound L. Co.*, 123 Cal. 97, 55 Pac. 788 (stipulation and order for appointment of referee).

20. *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788.

1. *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694 (citing Civ. Code, §§ 1636, 1641, 1643, 1652).

2. *Rosenthal v. Bauer*, 30 Cal. App. 277, 157 Pac. 1137 (contract of guaranty).

3. *Henne v. Summers*, 16 Cal. App. 67, 116 Pac. 86 (bond to secure performance of lease).

4. *Estate of Baubichon*, 49 Cal. 18 (antenuptial contract).

§ 173. **General and Particular Provisions.**—One clause of a contract, apparently conclusive as to some particular thing, may be enlarged or limited by other provisions upon the same subject.⁵ And in such a case the intent must be gathered from all the provisions considered together, the interpreter having his eye on the subject matter of the instrument, and giving effect to each clause, when this can be done.⁶ However, in order to give effect to intention, general words may be restrained by a particular recital which follows them, when such recital is used by way of limitation or restriction.⁷ And when general and particular provisions deal with the same subject matter, the specific provisions, if inconsistent with the general provisions, are of controlling force.⁸ Thus a general covenant in a lease with reference to alterations is, of course, subject to and modified by a special agreement regarding the installation of an elevator.⁹ So, too, specific covenants in a deed are not controlled by general language following.¹⁰ Although when a general description in a deed is certain, and a particular description uncertain, the general description must prevail.¹¹

Particular clauses subordinate to general intent.—Intent must be found by a fair interpretation of all the terms of the contract, and if any phrase or clause be repugnant to or inconsistent with what appears to be the intention of the parties as thus gathered, it should

5. *San Diego v. Granniss*, 77 Cal. 511, 19 Pac. 875; *Dollar v. International Banking Corp.*, 10 Cal. App. 87, 101 Pac. 35 (certificate of deposit). And see *infra*, § 179.

6. *San Diego v. Granniss*, 77 Cal. 511, 19 Pac. 875.

7. *Henne v. Summers*, 16 Cal. App. 67, 116 Pac. 86 (bond securing performance of lease). See *infra*, § 179, as to general words following specific enumeration.

8. Code Civ. Proc., § 1859; *Scud-*

der v. Perce, 159 Cal. 429, 114 Pac. 571 (partnership agreement as to division of accounts); *Soule v. Northern Construction Co.*, 33 Cal. App. 300, 165 Pac. 21. See EVIDENCE.

9. *Metzler v. Thye*, 163 Cal. 95, 124 Pac. 721.

10. *Alvord v. Spring Valley G. Co.*, 106 Cal. 547, 40 Pac. 27. See DEEDS.

11. *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491. See DEEDS.

be rejected.¹² "Particular clauses of a contract are subordinate to its general intent."¹³ Greater regard is to be had to the clear intention of the parties than to any particular words which they have used.¹⁴ But "a particular intent will control a general one that is inconsistent with it."^{14a}

§ 174. Written and Printed Matter—Figures.—When a contract is partly written and partly printed, the written parts control the printed parts, and, if there is any repugnancy between the two, the printed part will be disregarded.¹⁵ This rule is expressed in section 1651 of the Civil Code, which provides as follows:

"Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form."¹⁶

12. *Coleman v. Commins*, 77 Cal. 548, 20 Pac. 77 (mortgage assigned to mortgagor by way of mortgage to secure advances to mortgagee).

13. Civ. Code, § 1650; *Brookshire Oil Co. v. Casmalia etc. Co.*, 156 Cal. 211, 103 Pac. 927 (lease of oil lands construed with reference to pipe-laying privileges); *Turner v. Kearney*, 116 Cal. 62, 47 Pac. 866 (construing clause of harvest contract in regard to the use of one or more combined harvesters); *Jacoby v. Peck*, 23 Cal. App. 183, 137 Pac. 264 (agreement to lease premises of lessee providing direct lease was procured from lessor); *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694; sustained, 140 Cal. 635, 74 Pac. 312 (contract of guaranty).

14. *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694; sustained, 140 Cal. 635, 74 Pac. 312.

14a. Code Civ. Proc., § 1859. See EVIDENCE.

15. Code Civ. Proc., § 1862; *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189 (insurance policy). See EVIDENCE.

16. *Royal Ins. Co. v. Caledonian Ins. Co.*, 182 Cal. 219, 187 Pac. 748 (reinsurance policy); *Bonslett v. Butte County Canal Co.*, 18 Cal. App. 149, 122 Pac. 821 (sale of water); *United States Nat. Bank v. Waddingham*, 7 Cal. App. 172, 93 Pac. 1046 (promissory note); *Alvey v. Continental Ins. Co.*, 2 Cal. App. 253, 83 Pac. 285 (holding memoran-

So, when a printed blank is used in a contract for the sale of land, if there is any doubt about how the contract is to be construed, and words found in the printed part are repugnant to the general scope and purpose of the contract, as the same appears from the original or written parts thereof, the latter must control.¹⁷ Reference has also been made to a general rule of construction to the effect that where both written words and figures are used in a contract to express the same number, and there is a discrepancy between the two, the written words must prevail over the figures. The theory of this rule is that a man is more apt to commit an error with his pen in writing a figure than in writing a word.¹⁸

§ 175. Meaning of Words in General.—Every word of a contract should be accorded its just and proper meaning.¹⁹ Section 1644 of the Civil Code provides:

“The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”²⁰

dum attached to insurance policy did not modify the latter).

17. *Vorwerk v. Nolte*, 87 Cal. 236, 25 Pac. 412.

18. *Payne v. Commercial Nat. Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007 (but declaring it unnecessary to determine whether such a rule obtains in California). See *NEGOTIABLE INSTRUMENTS* as to construction of ambiguous bills and notes.

19. *Brickell v. Batchelder*, 62 Cal. 623 (citing Civ. Code, §§ 1639–1641). See to similar effect, *Code Civ. Proc.*, §§ 1861, 1865.

20. *Realty & Rebuilding Co. v. Rea*, 61 Cal. Dec. 11, 194 Pac. 1024 (lease); *Scudder v. Perce*, 159 Cal.

429, 114 Pac. 571; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (“taxes”); *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712 (deed); *Callahan v. Stanley*, 57 Cal. 476; *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of fruit crop); *Tucker, Lynch & Coldwell v. Hawley*, 23 Cal. App. 460, 138 Pac. 358 (holding word “represented” used in agreement to pay broker’s commission in event of property being leased to a certain company, “or any concern represented by” a designated person, was used in ordinary sense); *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71 (holding words used, according to their ordinary signification, clothed

An objection to the application of this rule on the ground that such a construction makes the undertaking of one party unreasonable has been said to be wholly without merit. "Many persons enter into unreasonable contracts, and it is no function of the courts to relieve them from the effects of their foolishness."¹ A further rule is that a word must be interpreted from its context and the circumstances of the case.² Whatever may be the trade or commercial meaning of a word or phrase, such meaning is always controlled by the express contract of the parties.³ Parties have power to define the words which they use, and their definitions may not be attacked on the ground that they are repugnant to the words defined. If the agreed definitions are free from ambiguity, then the only rule necessary to be invoked is the one requiring contracts to be enforced according to the intention of the parties who made them.⁴ "Words in a contract which are wholly inconsistent with its nature or with the main intention of the parties are to be rejected."⁵ And it is the rule that in the absence of any expression in the contract to the contrary, words which are not synonymous were never intended to be so used.⁶

agent with ample authority to enter into a contract for the sale of real estate).

1. *Francisco v. Schleischer*, 34 Cal. App. Dec. 158, 195 Pac. 691.

2. *Anderson v. Willson*, 32 Cal. App. Dec. 646, 191 Pac. 1016.

3. *Browning v. McNear*, 158 Cal. 525, 111 Pac. 541 (phrases "payable against shipping receipts," "payable when shipped," "payable f. o. b.," as used in contracts of sale, referred to).

4. *Morrison v. Wilson*, 30 Cal. 344 (deed); *Anderson v. Willson*, 32 Cal. App. Dec. 646, 191 Pac. 1016 ("right of way").

5. Civ. Code, § 1653; *Ames v. Southern Pacific Co.*, 141 Cal. 728, 99

Am. St. Rep. 98, 75 Pac. 310 (railroad ticket); *Brookshire Oil Co. v. Oasmalia etc. Co.*, 156 Cal. 211, 103 Pac. 927 (lease of oil lands held not to grant lessees exclusive rights to lay pipes on premises); *Kelly v. Great Western Acc. Ins. Co.*, 31 Cal. App. Dec. 927, 189 Pac. 785; *Parrish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694; sustained, 140 Cal. 635, 74 Pac. 312 (contract of guaranty). And see *supra*, § 163.

6. *Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650 (holding that by the use of the words "recoveries or avails" the parties referred to two different things).

It is also a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another.⁷ When contracting parties use the same word three times, and in the first two instances its meaning is plain, it should be given the same meaning when used the third time.⁸

Evidence tending to show the signification of words agreed upon by the parties is admissible.⁹ Section 1861 of the Code of Civil Procedure provides:

"The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly."

It has been declared that this section plainly provides that it may be shown by evidence that the language is used in a technical, local or peculiar sense, and not merely that evidence may be introduced to show what such meaning is, when language is so used; that this rule would apply as well to a term indicating a statutory weight or measure as to any other term used in a writing.¹⁰ As the

7. *Pringle v. Wilson*, 156 Cal. 313, 24 L. R. A. (N. S.) 1090, 104 Pac. 316 (phrase "expiration of the term" as used in a lease ordinarily means an ending of the term by lapse of the time provided in the lease for its duration); *Saunders v. Clark*, 29 Cal. 299 (agreement to pay money upon "the recovery of the possession" of certain real property).

8. *Colfax Mountain Fruit Co. v. Southern Pac. Co.*, 118 Cal. 648, 40 L. R. A. 78, 50 Pac. 775 ("forward" as used in contract to carry fruit construed to mean "to carry or transport" throughout the agreement).

9. *Higgins v. California Petroleum etc. Co.*, 120 Cal. 629, 52 Pac. 1080. And see *Cohn v. Bessemer Gas Engine Co.*, 30 Cal. App. Dec. 389, 186 Pac. 200 (holding purchaser of gas engine had right to explain his understanding of words used in contract).

10. *Higgins v. California Petroleum etc. Co.*, 120 Cal. 629, 52 Pac. 1080 (evidence allowed to show that term "gross ton" was intended to mean long ton of 2,240 pounds). And see *Higgins v. California etc. Co.*, 109 Cal. 304, 41 Pac. 1087 (holding that the ton referred to, upon the facts as they appeared, was "equal to two thousand pounds

meaning attached to a word and the identification of the subject matter involve the interpretation and not the reformation of a contract, after the allegation of the execution of the agreement it is sufficient to declare the meaning of the parties as to the terms employed in order that the intention may be more artificially and accurately expressed. But a mere allegation that the parties intended that the contract should have a certain meaning is not an allegation of any fact at all, and is wholly insufficient to admit parol evidence of what the facts underlying it were.¹¹

If a phrase has no ascertainable meaning, and it was in fact differently understood by the parties, it must be a case in which there was no agreement.¹²

§ 176. Technical Words.—"Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."¹³ Legal terms are to be given their legal meaning unless obviously used in a different sense.¹⁴ But a word which is not exclusively technical

avoirdupois, and no more"). But see *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365. (In this case it is intimated that the rule as laid down by *Higgins v. California Petroleum etc. Co.*, 120 Cal. 629, 52 Pac. 1080, is too broad. See *infra*, § 188.)

11. *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344 (holding that under section 1636 of the Civil Code and the other rules prescribed for the interpretation of contracts there could be no doubt that plaintiff, upon an allegation that it was so understood by the parties, could prove that "sale" was used for "exchange," the latter being in fact a species of sale).

12. *Weinreich v. Hensley*, 121

Cal. 641, 54 Pac. 254 (meaning of "freight allowance" in contract for sale of merchandise held not ascertainable). As to meeting of minds, see *supra*, § 24.

13. Civil Code, § 1645; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Callahan v. Stanley*, 57 Cal. 476; *MacFarland v. Walker*, 40 Cal. App. 508, 181 Pac. 248 (quitclaim deed); *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 31 Pac. 367 (contract for sale of saw-logs).

Slang or colloquial phrases in the law of contracts, note, 11 A. L. R. 661.

14. *Weinreich E. Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667 (bond to secure performance of lease).

is not necessarily to be given a technical sense, unless shown to have been used in that sense.¹⁵ When words having a technical or local significance appear, evidence explanatory of them is admissible, not for the purpose of adding to, or qualifying, or contradicting the contract, but for the purpose of ascertaining it by expounding the language, and so enabling the court to interpret it according to the actual intention of the parties, and the law and usage of the place where it is to be performed.¹⁶ And if the terms used are regarded as technical, or as terms having a special signification given to them by local usage, proof can only be made of such local usage, or of the sense in which they were usually understood, and the testimony of a party as to how he understood them is incompetent.¹⁷ Conversely, where the words are not used in any special or local sense, their meaning is not a matter to be established by expert testimony, but they are to be given their ordinary meaning.¹⁸ In the absence

15. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 120 Pac. 15 (construing by-law of corporation restricting conveyances); *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712 (exception from deed of lands "heretofore conveyed" held to mean lands previously sold).

16. Civ. Code, §§ 1636, 1646; *Alta Planing Mill Co. v. Garland*, 167 Cal. 179, 138 Pac. 738 (holding expert witness might testify that under prevailing custom in city terms "shoring, bracing and trenching" had no reference to underpinning); *Myers v. Tibbals*, 72 Cal. 278, 13 Pac. 695 (in an action to recover the value of certain marble sold and delivered under a contract requiring it to be "finished and ready for setting" in a particular building, parol evidence of the meaning of that expression as used by marble-cutters is admissible);

Callahan v. Stanley, 57 Cal. 476 (evidence offered to show that by the custom of the country in the locality of leased premises "stubble" included grain remaining uncut after the period of harvest); *Berry et al. v. Kowalsky*, 3 Cal. Unrep. 418, 27 Pac. 286 (holding oral evidence admissible to explain the abbreviation "S/87" descriptive of wheat to be delivered under contract).

17. *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 31 Pac. 367 (evidence of understanding of party to contract for sale of saw-logs as to meaning of terms "quarter scale" and "waste" held inadmissible).

18. *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365, 370, 374 (holding where contract showed adoption of no other than legal standard of weights, evidence of local usage among manufacturers of

of technical words or phrases, whose meaning is obscure, the office of interpretation belongs to the court.¹⁹

§ 177. Abbreviations.—Courts will determine the meaning of customary abbreviations of common words without proof and, especially, will they take judicial notice of abbreviations ordinarily used to designate time, such as those for the month, forenoon, afternoon.²⁰ Parol evidence is admissible to explain trade abbreviations in a contract; and their meaning may be explained as it was understood between the parties.¹ And, it is held, such evidence need not be stated in a pleading in which the written agreement is set out in *haec verba*.² Technical

structural steel to give estimated weight according to dimensions was inadmissible to vary terms of contract); *Remy v. Olds et al.*, 4 Cal. Unrep. 240, 34 Pac. 216 (holding word "vine" as employed in contract requiring a party to plant "grape vines" should be accorded common meaning and held to refer both to cuttings and to unrooted plants). See *supra*, § 175.

19. *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 31 Pac. 367. See *infra*, § 193, as to relative functions of court and jury in the interpretation of contracts.

20. *Estate of Lakemeyer*, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961, per Smith, C. (citing Code Civ. Proc., § 186; Civ. Code, § 1636, and authorities). See, also, *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130 (holding a date written "4-14-07" is sufficient, and will be construed as meaning April fourteenth, nineteen hundred and seven). See *ABBREVIATIONS*, vol. 1, p. 83.

1. *Yoshizumi v. Platt Produce Co.*, 30 Cal. App. Dec. 260, 185 Pac. 689 (proof of custom and usage admissible to prove meaning of *f. o.*

b.); *Brewer v. Horst etc. Co.*, 127 Cal. 643, 50 L. R. A. 240, 60 Pac. 418 (memorandum of sale of personal property, consisting of telegrams); *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202, sustaining decision of department in same case reported in 3 Cal. Unrep. 418, 27 Pac. 286 (evidence of meaning of abbreviation "S/87" in contract for purchase of wheat held admissible); *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206 (evidence to explain figures in written memorandum describing land sold held admissible). See *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93 (holding the use of abbreviations in the description of land contained in an authorization for its sale by real estate agents does not render the authorization void for uncertainty, where the abbreviations are intelligible and easily understood by the aid of a diagram attached to the document). See *SALES*.

2. *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202, sustaining decision of department in same case, reported in 3 Cal. Unrep. 418, 27 Pac. 286.

symbols and abbreviations are often very clear when interpreted, as they may be, by experts.^{2a} An abbreviation which is meaningless in the connection used, and which does not affect the legal construction of the agreement, will be regarded as surplusage.³ The initials f. o. b. standing for the expression "free on board," used frequently in mercantile contracts, imply that the lessor or vendor, as the case may be, will save the lessee or vendee from any expense attending the bringing of the article leased or sold to the point named, whether it be the initial point of transportation or the final destination of the consignment, as is frequently the case.⁴

§ 178. **Particular Words—"Aforesaid."**—There is no rule of construction which limits the application of the term "aforesaid" to that which immediately precedes it; nor is there any rule, where there is nothing in the nature of the case, or in the subject to which it refers to indicate the contrary, which would justify passing over an intervening general designation of property to which the term "aforesaid" refers, to limit its application to a special designation of particular property in a previous portion of the clause.^{4a}

"*Herein*," "*Hereunder*."—"Herein" as used in legal phraseology is a locative adverb, and may refer to a section, or to the entire instrument in which it is used,

2a. Civ. Code, §§ 1644, 1645; Law v. Northern Assur. Co., 165 Cal. 394, 132 Pac. 590 (holding that experts could testify that the letters "C. O. C." as employed in insurance contracts mean "in the course of construction," and further, that the particular contract concerned was not rendered materially ambiguous by the use of an abbreviation for the name of the insurer).

3. *Berry v. Kowalsky*, 95 Cal.

134, 29 Am. St. Rep. 101, 30 Pac. 202, sustaining decision of department in same case, reported in 3 Cal. Unrep. 418, 27 Pac. 286; *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

4. *Acton Rock Co. v. Lone Pine Utilities Co.*, 30 Cal. App. Dec. 739, 186 Pac. 809. See *SALES*.

4a. *In re Pearsons Estate*, 98 Cal. 603, 33 Pac. 451.

and its meaning and application are to be determined by the context.⁵ The same is true of "hereunder."⁶

"*Limited.*"—The word "limited," in a clause "the number not limited," may be construed to be the equivalent of "fixed" or "specified."⁷

"*Practicable.*"—A contract to do a thing "as soon as practicable" implies that circumstances may occur which will delay the completion of it. The word "practicable" cannot be understood with regard to the means at command, for they may be entirely inadequate; but in ascertaining what was intended, the nature of the contract, the difficulties to be overcome, and the importance to the other party of an early completion of it are to be considered.⁸

"*Year.*"—The word "year," when used in a contract, does not necessarily mean a calendar year. Its meaning is to be determined from the connection in which it is used, and from the subject matter of the contract.⁹

"*Annulment*"—"Rescission"—"*Cancel.*"—As applied to actions for the extinction of contracts it is held that "annulment" and "rescission," for all practical purposes, have the same meaning, and may be used interchangeably.¹⁰ But there is authority for the proposition that the word "cancel" in a contract is not the equivalent of the

5. In re Pearsons Estate, 98 Cal. 603, 33 Pac. 451 (construing will).

As to meaning of "by" as fixing time for performance of an act or happening of an event, see note, 12 A. L. R. 1168; and as to meaning of, and rights imported by, term "concession," see note, 14 A. L. R. 627.

6. Pringle v. Wilson, 156 Cal. 313, 24 L. R. A. (N. S.) 1090, 104 Pac. 316 (hereunder held to refer to entire lease).

7. Griffiths v. Henderson, 49 Cal. 566 (lease of land for dairy pur-

poses, lessor to furnish cows "the number not limited").

8. Roody v. Smith, 42 Cal. 245 (contract to build dams).

9. Williams v. Bagnelle, 138 Cal. 699, 72 Pac. 408 (construing it to mean "school year" in contract for teacher's employment); Brown v. Anderson, 77 Cal. 236, 19 Pac. 487 (sale of crop of fruit which might "grow or be produced in a certain year").

10. Vaughn v. Fey, 32 Cal. App. Dec. 230, 190 Pac. 1041. See CANCELLATION OF INSTRUMENTS.

word "rescind"; that an agreement to cancel a contract does not involve the placing of the parties in statu quo, as is the case with a rescission, but in itself effects a complete settlement;¹¹ that when parties to a contract used the word, "rescind" where "cancel" was plainly meant, the word should be so interpreted.¹²

"Sale"—"Price."—It is clear that the word "sale," when used in a contract, does not necessarily mean a transfer for money only. It is not a word of fixed and invariable meaning. It may be given a narrow or broad meaning, as may be indicated by the context or the surrounding circumstances and the conduct of the parties.¹³ And "price" does not necessarily mean value in money. It may mean money or some other equivalent.¹⁴ Nor, it has been held, does the word "sold" necessarily and in all connections, mean that a conveyance must be made or that the title must pass.¹⁵ But, on the other hand, when nothing appears in the context or circumstances to control it, the word primarily means a consummated sale, that is, a sale and delivery, or a passing of the title.¹⁶

"Negotiate."—Conceding that the word "negotiate" may in some connections be construed to involve the sale or transfer of some property right, it is not so interpreted in contracts for the sale or renting of real estate.¹⁷

"Conveyance."—While the term "conveyance" has often been defined in such manner as to include leases of terms for years, it is generally held that, in its ordinary significance, the term does not include such leases.¹⁸

11. *Winton v. Spring*, 18 Cal. 451.

12. *Weil v. Jones*, 53 Cal. 46.

13. *W. F. Boardman Co. v. Petch*, 62 Cal. Dec. 97, 199 Pac. 1047.

14. *Kinard v. Jordan*, 10 Cal. App. 219, 101 Pac. 696.

15. *Christensen v. Cram*, 156 Cal.

633, 105 Pac. 950; *Eaton v. Richeri*, 83 Cal. 185, 23 Pac. 286.

16. *Christensen v. Cram*, 156 Cal. 633, 105 Pac. 950.

17. *Salter v. Ives*, 171 Cal. 790, 155 Pac. 84; *Oulkahan v. Baldwin*, 100 Cal. 648, 35 Pac. 310.

18. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

See LANDLORD AND TENANT.

"Improvement"—*"Install"*—*"Installation."* — Words expressing a promise to build an improvement do not, as a rule, indicate the intent of the parties to the contract that a mere structure should be erected, but that the improvement should be adapted to the use to which it is generally applied. The words "install" and "installation," when applied to machinery have a technical meaning, and when so used in a lease should be interpreted accordingly. A covenant in a lease by the lessee to install an elevator "from the basement to the sidewalk in front of" the demised building should be construed as meaning that he would provide a suitable lift, with the usual accessories connecting the basement of the building which he occupied as tenant, with the sidewalk in front of it, without any obligation being imposed upon the lessor of preparation of the premises for the reception of the machinery.¹⁹

"Inclosed."—According to the generally accepted meaning, a frame building in the course of construction is "inclosed" when the outside sheathing is on, whether it is rustic, sheath lath, tongued and grooved or shingles, and the rough boarding is on the roof.²⁰

"Omission" as employed in the usual clause in building contracts permitting the owner to request omissions is generally considered to be limited to things which, upon the conditions specified, might be entirely left out of the building, and not to extend to anything within said specifications which the owner might elect to take off the contractor's hands and perform or finish himself.¹

§ 179. General Words Following Specific Enumeration. The rule that in the construction of instruments in writing general words following an enumeration of specific things

19. Metzler v. Thyne, 163 Cal. 95, etc. Co., 14 Cal. App. 632, 112 Pac. 892.
124 Pac. 721.

1. Shaver v. Murdock, 36 Cal. 293.
20. Bacigalupi v. Phoenix Bldg.

are usually restricted to things of the same kind, ejusdem generis, as those specifically enumerated, applies in the case of contracts. Thus it has been held that a contract for the sale of grapes containing a provision that "in case of any prohibition or other legislative acts, enacted either in the United States, the state of California, or San Bernardino county, which in any way will interfere with the manufacture or shipments of the products of the party of the second part, that this contract will then become null and void," was not terminated by legislation increasing the tax upon brandy used in fortifying sweet wines.²

§ 180. Surrounding Circumstances.—The rule that the intention of parties is to be ascertained from the writing alone, where a contract is reduced to writing, is subject to other rules of interpretation.³ A court is not only to take a contract by all its corners, but is to be placed in the seats of the parties when it was made. In other words, a contract is to be construed in the light and with the knowledge of surrounding circumstances.⁴ Section 1647 of the Civil Code provides that

2. *Conger v. Italian Vineyard Co.*, 62 Cal. Dec. 53, 199 Pac. 503.

3. *Snyder v. Holt Mfg. Co.*, 134 Cal. 324, 66 Pac. 311.

4. *In re Prather's Estate*, 183 Cal. 314, 191 Pac. 521 (contract for services of attorney); *H. Hackfeld & Co., Ltd., v. Castle*, 61 Cal. Dec. 721, 198 Pac. 1041 ("f. o. b."); *Burrows v. Petroleum Dev. Co.*, 181 Cal. 253, 84 Pac. 5 (contract to drill oil well); *Payne v. Commercial Nat. Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007; *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951 (contract granting right to cut timber in consideration of erection of sawmill); *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 Pac. 989 (accord and satisfaction); *New Liverpool Salt*

Co. v. Western Salt Co., 151 Cal. 479, 91 Pac. 152 (construing provision for forfeiture in contract for sale of salt); *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536 (agreement to sell half interest in land); *Neale v. Morrow*, 150 Cal. 414, 88 Pac. 815 (promissory note); *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917 (purchase of salt); *Walsh v. Abbott*, 145 Cal. 285, 104 Am. St. Rep. 38, 78 Pac. 715; *Creighton v. Gregory*, 142 Cal. 23, 75 Pac. 569 (accord and satisfaction); *Daly v. Ruddell*, 137 Cal. 671, 70 Pac. 784; *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362; *Turner v. Kearney*, 116 Cal. 62, 47 Pac. 866 (contract to harvest grain crop); *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 34 L. R. A. 857, 44 Pac.

“A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.”⁵

189; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491; *Waterman v. Morrell*, 68 Cal. 217, 9 Pac. 71 (sale of refuse which might accumulate during manufacture of lumber); *Gerdes v. Moody*, 41 Cal. 335 (deed); *Walsh v. Hill*, 38 Cal. 481 (deed); *Saunders v. Clark*, 29 Cal. 299 (conveyance of land); *McNeil v. Shirley*, 33 Cal. 202 (contract of agency for sale of realty); *First Federal Trust Co. v. Howard Investment Co.*, 36 Cal. App. Dec. 35; *Ransome Const. Co. v. Von Schroeder*, 34 Cal. App. 475, 167 Pac. 1144; *Slama Tire Protector Co. v. Ritchie*, 31 Cal. App. 555, 161 Pac. 25; *Fee v. McPhee Co.*, 31 Cal. App. 395, 160 Pac. 397 (contract to superintend construction of building); *Schwab v. Bridge*, 27 Cal. App. 204, 149 Pac. 603; *Ransome Const. Co. v. Von Schroeder*, 34 Cal. App. 475, 167 Pac. 1144 (contract to clear real property from debris resulting from fire); *Whitney v. Aronson*, 21 Cal. App. 9, 130 Pac. 700 (lease of building lessor to supply heat); *Luitweiler etc. Engine Co. v. Ukiah Water etc. Co.*, 16 Cal. App. 198, 116 Pac. 707, 712 (sale of pump); *King v. Samuel*, 7 Cal. App. 55, 93 Pac. 391; *Hurwitz v. Gross*, 5 Cal. App. 614, 91 Pac. 109 (sale of land, vendee to assume chattel mortgages of orange crop growing thereon); *Remy v. Olds*, 4 Cal. Unrep. 240, 34 Pac. 216 (contract to plant grape vines).

5. *Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156 (contract employing attorneys); *Frost v. Alward*, 176 Cal. 691, 169 Pac. 379 (contract to haul parcel post); *First Nat. Bank v. Ruddock Co.*, 158 Cal. 334, 111

Pac. 86 (promissory note); *First Nat. Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856 (contract of guaranty); *Ames v. Southern Pacific Co.*, 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 310 (railroad ticket); *Curtin v. Ingle*, 137 Cal. 95, 69 Pac. 836, 1013 (contract to fill certain sacks with grain and ship, owner to be paid market price for sacks not used); *Snyder v. Holt Mfg. Co.*, 134 Cal. 324, 66 Pac. 311 (sale of harvester); *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189 (insurance policy); *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222 (deed); *Renton, Holmes & Co. v. Monnier*, 77 Cal. 449, 19 Pac. 820 (assignment of building contract); *Lang v. Pacific Brewing & Malting Co.*, 30 Cal. App. Dec. 758, 59 Cal. Dec. 161, 187 Pac. 81 (lease); *MacFarland v. Walker*, 40 Cal. App. 508, 181 Pac. 248 (grant); *Peterson v. Wagner*, 34 Cal. App. Dec. 823, 198 Pac. 25 (sale of crop of hops); *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of fruit crop); *Blair v. Wesinger*, 39 Cal. App. 269, 178 Pac. 545 (lease of store); *International Mortgage Bank v. Eaton*, 39 Cal. App. 39, 177 Pac. 880; *Van Loben Sels v. Producers' Fruit Co.*, 36 Cal. App. 201, 179 Pac. 403 (lease of farm land); *Bonslett v. Butte County Canal Co.*, 18 Cal. App. 149, 122 Pac. 821 (sale of water); *Austin v. Union Paving etc. Co.*, 4 Cal. App. 610, 88 Pac. 731 (stay bond on appeal); *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162 (sale of stock of merchandise); *Alvey v. Continental Ins. Co.*, 2 Cal. App.

Section 1860, Code of Civil Procedure, reads as follows:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."⁶

The purpose to be subserved by the rule declared by these sections is to place the court or jury in the position of the parties at the time the contract was made, so as to enable it to interpret intelligently the language used.⁷ This rule obviously contemplates the introduction of parol evidence.⁸ As has been declared,

"How all the 'circumstances surrounding the making of the contract' or the acts of the parties 'and the circumstances of each particular case,' other than the mere act of executing the contract and the 'circumstances' as exhibited by the writing itself, may be shown otherwise than by evidence extrinsic to the writing itself, it would, indeed, be difficult to point out."⁹

Accordingly, facts which tend to explain the language used, and to place the court or jury as nearly as may be

253, 83 Pac. 285 (fire insurance policy); *Ennis Brown Co. v. W. S. Hurst & Co.*, 1 Cal. App. 752, 82 Pac. 1056 (sale of potatoes); *Parish v. Rosebud Mining & Milling Co.*, 7 Cal. Unrep. 117, 71 Pac. 694; sustained, 140 Cal. 635, 74 Pac. 312 (contract of guaranty).

6. *Boland v. Smith*, 32 Cal. App. Dec. 189, 190 Pac. 825 (purchase of automobile); *Brady v. Fowler*, 31 Cal. App. Dec. 274, 188 Pac. 319; *Bonslett v. Butte County Canal Co.*, 18 Cal. App. 149, 122 Pac. 821; *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948 (sale of grapes). See Code Civ. Proc., § 1856 (declaring that its provisions do not affect those of section 1860 of the same code). See EVIDENCE.

7. *First Nat. Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856.

8. *Slankard v. Wagnon*, 181 Cal. 135, 183 Pac. 562 (purchase of land in possession of third party); *Pearshall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159 (sale and exchange of lands); *Jersey Island Dredging Co. v. Whitney*, 149 Cal. 269, 86 Pac. 509, 691 (contract for dredging work); *Welch v. British American Assur. Co.*, 148 Cal. 223, 113 Am. St. Rep. 223, 7 Ann. Cas. 396, 82 Pac. 964; *Daly v. Ruddell*, 137 Cal. 671, 70 Pac. 784 (contract to lay pipe). And see cases cited supra, this section.

9. *Peterson v. Wagner*, 34 Cal. App. Dec. 823, 108 Pac. 25 (sale of crop of hops).

in the situation of the parties as they contracted, are always admissible when the meaning of terms is debatable.¹⁰ After ascertaining the relation of the parties to each other, and to the subject matter, the court will, if possible, so construe the contract, however inartificially drawn, as to give effect to the intention of the parties, provided it can be done without disregarding the language of the instrument, when all its parts are considered.¹¹

But, it has been declared, section 1860 of the Code of Civil Procedure is not to be read as applicable to every contract that may come before the court for interpretation. It has its limitations and must be read in connection with other provisions of the code. To give it literal and universal application would bring it into direct conflict with section 1856 of the Code of Civil Procedure, which provides that, as a general rule, a contract in writing is presumed to contain all the terms of the agreement. Section 1625 of the Civil Code must also be read and harmonized with section 1860 of the Code of Civil Procedure. It reads:

“The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.”¹²

It is only where it is doubtful, uncertain or ambiguous that the surrounding circumstances become important in ascertaining the intent of the parties.¹³ The rule of evi-

10. *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536; *First Nat. Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856; *Hancock v. Watson*, 18 Cal. 137; *Van Demark v. California Home Extension Assn.*, 30 Cal. App. Dec. 269, 185 Pac. 866.

11. *First Nat. Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856 (citing *London etc. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58

Pac. 164; *Lafargue v. Harrison*, 70 Cal. 380, 59 Am. St. Rep. 416, 9 Pac. 259, 11 Pac. 366; *Graham v. Farmers' etc. Bank*, 116 Cal. 463, 48 Pac. 384; *Thompson v. McKay*, 41 Cal. 221).

12. *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948. See *supra*, § 166.

13. *Salter v. Ives*, 171 Cal. 790, 155 Pac. 84; *Pierce v. Merrill*, 128 Cal. 464, 79 Am. St. Rep. 56, 61

dence embodied in the code sections quoted above is invoked only in cases where upon the face of the contract itself there is doubt, and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said. These sections of the code simply enact the common-law rule, and it is not within their contemplation that a contract reduced to writing and executed shall have anything added to it or taken away from it by such evidence of "surrounding circumstances."¹⁴ Where the parties have themselves used words which require no interpretation, where the words are understood, there is no occasion for aid to their proper interpretation of meaning.¹⁵ A written authorization to an agent merely "to negotiate a lease" does not confer on the agent the power to enter into a contract of lease on behalf of his principal, and such authorization, not being uncertain in its terms, cannot be construed as conferring the power to lease by any consideration of the surrounding circumstances.¹⁶ Where the court sets the right interpretation, the introduction of evidence of the surrounding circumstances is not injurious, even though the contract is not ambiguous or uncertain.¹⁷

§ 181. Construing Instruments Together.—As a general rule, when several papers concerning one subject matter are separately executed by the same parties, all are to

Pac. 64; *Hawley v. Brumagim*, 33 Cal. 394; *Betts v. Orton*, 34 Cal. App. 397, 167 Pac. 1147.

14. *United Iron Works v. Outer Harbor etc. Co.*, 168 Cal. 81, 141 Pac. 917 (holding parol evidence of the "surrounding circumstances" is not admissible under section 1647 of the Civil Code or section 1860 of the Code of Civil Procedure, to show a warranty by the plaintiff, not expressly embodied in written contract; citing *Balfour v. Fresno*

Canal etc. Co., 109 Cal. 221, 41 Pac. 876; *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109; *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830).

15. *Cox v. McLaughlin*, 63 Cal. 196.

16. *Salter v. Ives*, 171 Cal. 790, 155 Pac. 84.

17. *Provident Gold Min. Co. v. Manhattan Securities Co.*, 168 Cal. 304, 142 Pac. 884.

be construed together as one contract.¹⁸ The intention of the parties is to be gathered from all the instruments, taken together, and the recitals in each may be explained or corrected by reference to any other.¹⁹ This rule is adopted as part of the statute law by the provisions of the Civil Code, section 1642.

“Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.”²⁰

18. *Cameron v. Burnham*, 146 Cal. 580, 80 Pac. 929 (contract between lessees of mining claim construed in connection with lease); *Gilliam v. Brown*, 126 Cal. 160, 58 Pac. 466 (a written proposal for the construction of a ditch, and a written bid therefor, followed by the giving of a bond for the performance of the proposed work, taken together, constitute a written contract for the proposed work); *McCrosky v. Ladd*, 96 Cal. 455, 31 Pac. 558 (note construed as part of contract of sale); *Goodwin v. Nickerson*, 51 Cal. 166 (promissory note and contemporaneous contract); *Patterson v. Donner*, 48 Cal. 369 (deed and writing in the nature of defeasance); *Gerdes v. Moody*, 41 Cal. 335 (deed and writing declaring conveyance made under power of attorney); *Howland v. Aitch*, 38 Cal. 133 (sale and delivery of personal property and making and delivery of note and guaranty); *Ingoldaby v. Juan*, 12 Cal. 564; *Creamery Package Co. v. Bennett*, 32 Cal. App. Dec. 999, 192 Pac. 328 (agreement on sheet of paper folded to make two pages, part of the writing following the signature and referring to the other part); *Holland-Meisell & Co. v. Kelly*, 37 Cal. App. 610, 174 Pac. 698 (letters); *Morrow v. Wells*, 30 Cal. App. 306, 158 Pac. 226 (contract to purchase land and crop mortgage); *Bullion &*

Exchange Bank v. Spooner, 4 Cal. Unrep. 531, 36 Pac. 121 (deed, agreement to reconvey, note and chattel mortgage). See *Elbert v. Los Angeles Gas Co.*, 97 Cal. 244, 32 Pac. 9 (letters and telegrams held to constitute contract). And see the following cases supporting the proposition that a guaranty of the performance of an agreement is to be construed in connection therewith and both are to be regarded as constituting a single contract; *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117 (guaranty appended to contract); *Otis v. Haseltine*, 27 Cal. 80 (sale of goods and agreement to indorse note of purchaser); *Haseltine v. Larco*, 7 Cal. 32 (charter-party and guaranty). See CHATTEL MORTGAGES, vol. 5, p. 68, note 18.

19. *Brannan v. Mesick*, 10 Cal. 95.

20. Civ. Code, § 1642; *Merkeley v. Fisk*, 179 Cal. 748, 178 Pac. 945 (agreements for sale of land by broker); *First Nat. Bank v. Spaulding*, 177 Cal. 217, 170 Pac. 407 (guaranty and notes); *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603 (deed of grant and deed of reconveyance); *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416 (checks held to constitute integral part of transaction evidenced by written contracts); *Cobb v. Doggett*, 142 Cal. 142, 75 Pac. 785 (absolute as-

The several contracts must be so construed as to give effect, as far as practicable, to every part of each instrument.¹ This is true although two contracts are made at different times, providing the later is not intended to entirely supersede the first, but only modifies it in certain particulars.² The two are to be construed as parts of one contract, the later superseding the earlier one wherever it is inconsistent therewith.³ When this is done the other rules in relation to interpretation must be applied, observing that

“However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.”⁴

signment of judgment construed in connection with contemporaneous agreement showing assignment was for collection); *Curtin v. Ingle*, 137 Cal. 95, 69 Pac. 836, 1013 (storage agreement construed in connection with receipt for goods); *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006 (contract for street work); *Brickett v. Batchelder*, 62 Cal. 623 (mortgage and note); *Kelly v. Great Western Acc. Ins. Co.*, 31 Cal. App. Dec. 927, 189 Pac. 785 (note and insurance policy); *McAuliff v. McFadden*, 42 Cal. App. 505, 183 Pac. 870 (written contract for sale of land and contemporaneous agreement as to payment); *Peterson v. Wagner*, 34 Cal. App. Dec. 823, 198 Pac. 25 (sale of crop of hops); *Rosenthal v. Bauer*, 30 Cal. App. 277, 157 Pac. 1137 (guaranty and resolution authorizing execution of same by corporation guarantor); *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820 (sale of hops embodied in three instruments); *Keifer v. Myers*, 5 Cal. App. 668, 91 Pac. 163 (transfer of stock and agreement for repurchase); *National Bank of Commerce v.*

Schirm, 3 Cal. App. 696, 86 Pac. 981 (promise made as security for note); *Johnson v. Levy*, 3 Cal. App. 591, 86 Pac. 810 (bill of sale of personal property in stable held not to include assignment of leasehold interest in stable afterward made to seller by third party); *Daniels v. Daniels*, 3 Cal. App. 294, 85 Pac. 134 (notes and auxiliary agreement); *Hewett v. Dean*, 3 Cal. Unrep. 385, 25 Pac. 753 (mortgage and note).

1. Civ. Code, §§ 1641, 1642; *McAuliff v. McFadden*, 42 Cal. App. 505, 183 Pac. 870; *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006; *Daniels v. Daniels*, 3 Cal. App. 294, 85 Pac. 134 (notes and auxiliary agreement).

2. *Burleson v. Northwestern Mut. Ins. Co.*, 86 Cal. 342, 24 Pac. 1064; *Bourn v. Dowdell*, 5 Cal. Unrep. 820, 50 Pac. 695. And see, generally, cases cited *supra*, this section.

3. *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 Pac. 325 (declaration of trust and contract of sale).

4. Civ. Code, § 1648; *Bricknell v. Batchelder*, 62 Cal. 623.

It is a question of fact for the jury whether or not the instrument in suit, in conjunction with the other instruments pleaded and proven, constitutes but a single, indivisible contract covering a single transaction.⁵ The intention of the parties is the determining factor in the ascertainment of whether a contract evidenced by several or separate writings is or is not divisible.⁶

It follows from the foregoing that where a contract sued on makes reference to another detached but specifically identified instrument as forming a part of it, such collateral writing, whether it tends to make the whole contract ambiguous or uncertain or not, is always admissible in evidence, and to refuse it admission will, in the ordinary case, be injurious error. It has been said upon the authority of a California case that the rule demanding the introduction of collateral writings which have been expressly made a part of a contract by reference is inapplicable to an instrument which, although referring to them, is complete in itself.⁷

§ 182. Limitations of Rule.—It has been declared that the fact, that in neither of two instruments is there any reference to the other, does not militate against the operation of the rule that several contracts relating to the same matter between the same parties and made as parts of substantially one transaction are to be taken together as provided in section 1642 of the Civil Code.⁸ However,

5. *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820.

6. *Stern v. Sunset Road Oil Co.*, 32 Cal. App. Dec. 145, 190 Pac. 651. See *infra*, § 191, as to severable and entire contracts generally.

7. *Tustin Fruit Assn. v. Earl Fruit Co.*, 6 Cal. Unrep. 37, 53 Pac. 693 (cited to this proposition in 17 Cyc. 365). But see *United States Iron Wks. v. Outer Harbor etc. Co.*, 168 Cal. 81, 141 Pac. 917 (declaring that the language of the court

in *Tustin Fruit Assn. v. Earl Fruit Co.*, 6 Cal. Unrep. 37, 53 Pac. 693, is, in effect, but a declaration that this court would not reverse the case for a technical error in refusing to allow the introduction of collateral writings unless it was shown, as it was not, that injury resulted from it).

8. *Spotton v. Dyer*, 42 Cal. App. 585, 184 Pac. 23 (note and contemporaneous agreement). And see *infra*, § 183.

there is authority to the contrary. The limitations of the rule have been declared in the following language:

“Obviously, the most certain criterion of the completeness of an individual writing will be found within the writing itself. It is therefore the general rule that two or more separately executed instruments may be considered and construed as one contract only when upon their face they deal with the same subject matter and are by reference to one another so connected that they may be fairly said to be interdependent. Of course, this rule is not so rigid as to be absolutely unyielding in the face of a suggestion contained in the writing itself that it is not complete, or of circumstances which call for the application of a well-defined exception to the rule that ‘a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.’ ”⁹

It is clear that the rule that several contracts between the same parties in relation to the same subject matter, and made as parts of the one transaction, are to be construed together, does not apply to several contracts of sale between different parties, made at different times, and upon different terms and conditions; and though one of such several contracts may refer to another for a description of the premises sold, they must be regarded as separate, and not as constituting one agreement.¹⁰ And where there is a direct declaration of intention that a writing shall be a complete contract, it is not to be construed, in connection with other instruments, merely as part of a transaction.¹¹

§ 183. Extrinsic Evidence.—Ordinarily, the identity of the parties to several instruments will be disclosed by

9. *Merkeley v. Fisk*, 179 Cal. 748, 178 Pac. 945, per Lennon, J. (citing and quoting *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820). See *supra*, § 180, as to surrounding circumstances as aid in construction of contracts. See *infra*, § 183, as to admissibility of extrinsic evidence

to show intention of parties as to separate instruments.

10. *Uhlhorn v. Goodman*, 84 Cal. 185, 23 Pac. 1114.

11. *A. R. G. Bus Co. v. White Auto Co.*, 34 Cal. App. Dec. 923, 61 Cal. Dec. 654, 198 Pac. 829.

a reference to the instruments themselves; but the question as to whether or not several instruments between the same parties were contemporaneously executed and intended to cover a single transaction oftentimes cannot be ascertained from an inspection of the instruments themselves. Consequently, if the intention of the parties be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention concerning the scope and effect of the several instruments.¹² The general rule that parol evidence is not admissible to alter, vary or contradict the terms of a written instrument has, it has been declared, no application to such question. In the language of the court:

“The defendants did not seek nor were they permitted to contradict by parol proof the covenants of the particular instrument in suit. They sought and were permitted to show in evidence a contemporaneous, collateral oral agreement of the parties to the several instruments, to the effect that the subject matter of each instrument should be but a unit in a series of sales which as a whole were to constitute the subject matter of a single transaction, and that the paramount consideration, undisclosed in the instruments themselves, which induced the execution of each instrument was the contemporaneous execution of all three instruments which, when executed, were to constitute a single contract. . . . The instrument in suit being silent upon the subject of the interdependence of the three writings, and failing to disclose the true consideration, or any consideration save that implied from the mutual covenants of the parties, which induced its execution, obviously the proof proffered and admitted in nowise contravened its express terms; and such evidence was therefore well within the exception to the general rule which permits proof of the execution and existence

12. *Merkeley v. Fisk*, 179 Cal. Dec. 654, 198 Pac. 829; *Torrey v. 748, 178 Pac. 945*; *Curtin v. Ingle*, Shea, 29 Cal. App. 313, 155 Pac. 137 Cal. 95, 69 Pac. 836, 1013; 820; *Johnson v. Levy*, 3 Cal. App. A. R. G. Bus Co. v. White Auto 591, 86 Pac. 810. And see, generally, cases cited *supra*, § 180.

of an oral agreement collateral to and executed contemporaneously with a written instrument, covering and controlling a material matter agreed to by the parties, distinct from but closely related to the express subject matter of the written instrument and not embodied therein."¹³

§ 184. Construction by Parties.—The intention of the parties is to be ascertained from the writing alone, if possible, and not from the subsequent actions of one of them.¹⁴ However, it is well recognized that the terms of a contract may be manifested by conduct when not stated in words.¹⁵ And where the meaning is doubtful, the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention.¹⁶

13. *Torrey v. Shea*, 29 Cal. App. 813, 155 Pac. 820, per Lennon, P. J. (citing authorities). As supporting these views, see *A. R. G. Bus Co. v. White Auto Co.*, 34 Cal. App. Dec. 923, 61 Cal. Dec. 654, 198 Pac. 829; *Peterson v. Wagner*, 34 Cal. App. Dec. 823, 198 Pac. 25. And see *supra*, § 182.

14. Civ. Code, § 1639; *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788; *Stockton Sav. & L. Soc. v. Purvis*, 122 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561; *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220.

15. Civ. Code, § 1621; *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128. See *supra*, §§ 7-10, as to implied contracts.

16. *D. Ghirardelli & Co. v. Students' Express & Transfer Co.*, 175 Cal. 427, 166 Pac. 16 (lease of wall for advertising purposes); *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951 (grant of right to cut timber in consideration of agreement to erect sawmill and "thereafter" commence manufacture of lumber); *Grant v. Banister*, 160 Cal. 774, 118 Pac. 253

(a deed indefinite in its terms may be made definite by practical construction of parties); *Smith v. Cucamonga Water Co.*, 160 Cal. 611, 117 Pac. 764 (but holding that evidence did not show abandonment by respondents of water rights; that no election had been exercised in this regard); *Keith v. Electrical Engineering Co.*, 136 Cal. 178, 68 Pac. 598 (agreement by defendant to pay royalty on articles to be manufactured under letters patent of plaintiff); *Mayberry v. Alhambra etc. Water Co.*, 125 Cal. 444, 54 Pac. 530, 58 Pac. 68 (agreement by owner of land in which stream arose with adjoining land owner for division of water); *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406 (logging contract); *Truett v. Adams*, 66 Cal. 218, 5 Pac. 96 (grant of land); *Pico v. Coleman*, 47 Cal. 65 (deed); *McNeil v. Shirley*, 33 Cal. 202 (power to sell land); *Mulford v. Le Franc*, 26 Cal. 88 (transfer of land); *Duff v. Anderson*, 33 Cal. App. Dec. 815, 195 Pac. 445 (sale of cattle); *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 183 Pac. 178 (con-

The law recognizes the practical construction of a contract as the best evidence of what was intended by its provisions.¹⁷ "Contemporaneous exposition is in general the best."¹⁸

Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. It is to be assumed that they best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each

tract of employment); Fairchild v. Cartwright, 39 Cal. App. 118, 178 Pac. 333 (agreement to accept less than full amount of claim against corporation); Rosenbaum Estate Co. v. Robert Dollar Co., 31 Cal. App. 576, 161 Pac. 10 (lease); Whitney v. Aronson, 21 Cal. App. 9, 130 Pac. 700 (lease of office-building, lessor to furnish heat); L. Scatena & Co. v. Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187 (when the finding of the court in accordance with the practical construction of the parties is fairly supported by the evidence, it cannot be disturbed on appeal); Vulcan Iron Works v. Cook, 15 Cal. App. 410, 114 Pac. 995 (contract to furnish iron and steel for building); Dollar v. International Banking Corp., 10 Cal. App. 83, 101 Pac. 34 (certificate of deposit); Rockwell v. Light, 6 Cal. App. 563, 92 Pac. 649 (contract to paint houses); Tustin Fruit Assn. v. Earl Fruit Co., 6 Cal. Unrep. 37, 53 Pac. 693 (sale of fruit).

17. *W. F. Boardman Co. v. Petch*, 186 Cal. 296, 199 Pac. 1047 (contract employing manager of gas company); Riebli v. Husler, 7 Cal. Unrep. 1, 69 Pac. 1061 (sale of cattle by husband to wife); Union Oil Co. v. Stewart, 158 Cal.

149, Ann. Cas. 1912A, 567, 110 Pac. 313 (deed); Raullet v. Northwestern Nat. Ins. Co., 157 Cal. 213, 107 Pac. 292 (insurance policy); Mitau v. Roddan, 149 Cal. 1, 6 L. R. A. (N. S.) 275, 84 Pac. 145 (contract to sell hops); Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257 (construing contract relating to sale of mining stock as conditional sale); Williams v. Ashurst Oil etc. Co., 144 Cal. 619, 78 Pac. 28 (contract for shares of capital stock); Bell v. Staacke, 141 Cal. 186, 74 Pac. 774 (deed); California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839 (contract for purchase of property at valuation to be determined by third parties); Fay Improvement Co. v. De Budge, 35 Cal. App. Dec. 209, 199 Pac. 819 (contract by which property owner agreed to pay for street work done in front of his "own property" held to include property owned by his minor children of whom he was guardian); De La Cuesta v. Armstrong Holdings Co., 32 Cal. App. Dec. 801, 192 Pac. 135 (contract employing broker to negotiate sale of real estate); Baldwin v. Napa etc. Wine Co., 1 Cal. App. 215, 81 Pac. 1037 (sale of wine).

18. Civ. Code, § 3535.

(See "Evidentiary",
1926 Supp. 458)



party is alert to his own interests, and to insistence on his rights, and that whatever is done by them contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. They are, it has been said, far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have arisen, and one of them seeks a construction at variance with the practical construction they have placed upon it.¹⁹ But, in construing acts or expressions as constituting interpretation by the parties of a written contract at variance with the ordinary import of its terms, it is a cardinal rule that it ought to appear with reasonable certainty that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are later sought to be applied.²⁰ The parties, in all fairness, should be bound by the construction placed by themselves upon their agreement.¹ The legal effect of their conduct is a question for the court.²

It is only in relation to contracts that are uncertain, or of doubtful construction on their face, that conduct is to be looked to in aid of construction. Where the terms are plain and certain, the court will be guided by the language used and construe the intention of the parties to have been in accordance with their agreement.³ Where

19. *Mitau v. Roddan*, 149 Cal. 1, 6 L. R. A. (N. S.) 275, 84 Pac. 145, per Lorigan, J.

20. *P. Pastene & Co. v. Greco Canning Co.*, 268 Fed. 168.

1. Civ. Code, § 1636; *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257; *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of fruit crop); *W. F. Boardman Co. v. Petch*, 32 Cal. App. Dec. 713; *Gribbling v. Bohan*, 26 Cal. App. 771, 148 Pac. 530;

Vulcan Iron Works v. Cook, 15 Cal. App. 410, 114 Pac. 995.

2. *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 Pac. 989; *Creighton v. Gregory*, 142 Cal. 34, 75 Pac. 569.

3. *Pierce v. Morrill*, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64; *Truett v. Adams*, 66 Cal. 218, 5 Pac. 96; *Hawley v. Brumagim*, 33 Cal. 394; *Coalinga Pacific Oil etc. Co. v. Associated Oil Co.*, 16 Cal. App. 361, 116 Pac. 1107 (applying

its terms are clear and explicit, the meaning not doubtful, and there is no latent ambiguity, a contract cannot be varied by subsequent conduct of the parties showing their understanding that a right under it was several and not joint, or by surrounding circumstances. The parties must be deemed bound by the contract, regardless of the results produced.⁴

§ 185. Construction in Favor of One Party.—Any uncertainties existing in an agreement are to be interpreted most strongly against the one who prepared the instrument and caused the uncertainties to be present.⁵ Section 1654 of the Civil Code declares:

“In case of uncertainty not removed by the preceding rules,⁶ the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party.”⁷

rule to contract for sale of crude oil); *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220.

4. *Jameson v. Chanslor-Canfield M. Oil Co.*, 176 Cal. 1, 167 Pac. 369.

5. *Payne v. Neuval*, 155 Cal. 46, 99 Pac. 476; *Hoff v. Lodi Canning Co.*, 34 Cal. App. Dec. 448, 196 Pac. 779.

6. Referring to rules of sections 1635-1653, Civil Code.

7. *Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156 (contract for employment of attorneys); *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242 (contract limiting liability of telegraph company); *Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912A, 567, 110 Pac. 313 (deed); *Keith v. Electrical Engineering Co.*, 136 Cal. 178, 68 Pac. 598 (agreement to pay royalty for articles manufactured under letters pat-

ent); *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391 (building contract); *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006 (contract for street work); *Lassing v. James*, 107 Cal. 348, 40 Pac. 534 (contract for pasturage of cattle); *O'Connor v. West Sacramento Co.*, 35 Cal. App. Dec. 857; *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of fruit crop); *Harter v. Delno*, 33 Cal. App. Dec. 452, 194 Pac. 300 (construing contract in favor of assignee and those claiming under him); *De La Cuesta v. Armstrong Holdings Co.*, 32 Cal. App. Dec. 801, 192 Pac. 135 (contract with real estate broker for sale of property); *Subr v. Metcalfe*, 33 Cal. App. 59, 164 Pac. 407 (building contract construed against contractor); *Ruffin v. Becker*, 27 Cal. App. 163, 148 Pac. 233 (sale of leased premises); *Needless v. Coffee*, 27

Such presumption is furthered where it appears that the promisor drew the contract.⁸ Thus, any uncertainty or ambiguity in an insurance contract is to be construed most strongly against the insurer. He frames it, and is supposed to make it as potent as possible in his own favor.⁹ Where the language of one party may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the other party. This is the rule stated in sec-

Cal. App. 532, 150 Pac. 791 (sale of land); *Ruffin v. Lilienthal*, 26 Cal. App. 701, 148 Pac. 233 (sale of leased premises); *Archer v. Lewis*, 19 Cal. App. 135, 124 Pac. 859 (contract to sell land construed as option); *Henne v. Summers*, 16 Cal. App. 67, 116 Pac. 86 (lease of storeroom); *Dollar v. International Banking Corp.*, 10 Cal. App. 83, 101 Pac. 34 (certificate of deposit); *United States Nat. Bank v. Waddingham*, 7 Cal. App. 172, 93 Pac. 1046 (promissory note, the promisor having selected a blank form having a penal clause); *Butt v. Maier & Zobelein Brewery*, 6 Cal. App. 581, 92 Pac. 652 (construing lease against lessor); *Daniels v. Daniels*, 3 Cal. App. 294, 85 Pac. 134 (promissory notes and auxiliary agreement).

See, also, Code Civ. Proc., § 1864, which provides as follows: "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the

party in whose favor the provision was made." And see Code Civ. Proc., § 1866, to the effect that a construction of an instrument in favor of natural right is to be preferred. See EVIDENCE.

8. *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391.

9. *Maryland Casualty Co. v. Industrial Acc. Com.*, 178 Cal. 491, 173 Pac. 993; *Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal. 348, 139 Pac. 807; *Goorberg v. Western Assur. Co.*, 150 Cal. 510, 119 Am. St. Rep. 246, 11 Ann. Cas. 801, 10 L. R. A. (N. S.) 876, 89 Pac. 130; *Welch v. British American Assur. Co.*, 148 Cal. 223, 113 Am. St. Rep. 223, 7 Ann. Cas. 396, 82 Pac. 964; *Bayley v. Employers' etc. Assur. Corp.*, 125 Cal. 345, 58 Pac. 7; *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 23 Am. St. Rep. 460, 26 Pac. 872; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Kelly v. Great Western Acc. Ins. Co.*, 31 Cal. App. Dec. 927, 189 Pac. 785; *Secombe v. Glen's Falls Ins. Co.*, 31 Cal. App. Dec. 278, 188 Pac. 305. See INSURANCE.

tion 1649 of the Civil Code,¹⁰ and in section 1864 of the Code of Civil Procedure.¹¹ Section 1649 provides:

“If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.”¹²

Parol evidence is admissible for the purpose of enabling the court to ascertain whether or not the principles embodied in sections 1649 or 1654 of the Civil Code are applicable to the facts of any particular case.¹³

Where there is no imperfection or ambiguity in the language of a contract, it must of course be interpreted according to the intention of the parties.¹⁴ Whatever may be the uncertainty existing, if it is readily removed by a resort to the statutory rules of construction, the rule that any uncertainty existing in the language of a contract must be “interpreted against the party who caused the uncertainty to exist” cannot be invoked.¹⁵ It has been declared that a party suing upon a contract has a right to claim a construction more favorable to him than

10. *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of fruit crop); *People v. Nolan*, 33 Cal. App. 493, 165 Pac. 715.

11. *Ruffin v. Becker*, 27 Cal. App. 163, 148 Pac. 223; *Ruffin v. Lilienthal*, 26 Cal. App. 701, 148 Pac. 233. See EVIDENCE.

12. *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391 (building contract); *Lassing v. James*, 107 Cal. 348, 40 Pac. 534 (contract for pasturage of cattle); *Lang v. Pacific Brewing & Malting Co.*, 30 Cal. App. Dec. 758, 59 Cal. Dec. 161, 187 Pac. 81 (lease of realty); *California Packing Corp. v. Grove*, 34 Cal. App. Dec. 409, 196 Pac. 891 (sale of crop of peaches); *California Packing Corp. v. Larsen*, 33 Cal. App.

Dec. 765 (sale of fruit); *Whitney v. Aronson*, 21 Cal. App. 9, 130 Pac. 700 (lease of office building, lessor to supply heat); *Bonslett v. Butte County Canal Co.*, 18 Cal. App. 149, 122 Pac. 821 (sale of water); *Henne v. Summers*, 16 Cal. App. 67, 116 Pac. 86 (bond to secure performance of obligations of lease); *Ennis Brown Co. v. W. S. Hurst Co.*, 1 Cal. App. 752, 82 Pac. 1056 (sale of potatoes).

13. *Lassing v. James*, 107 Cal. 348, 40 Pac. 534. And see, generally, cases cited *supra*, this section.

14. *Bayley v. Employers' etc. Corp.*, 125 Cal. 345, 58 Pac. 7. And see *supra*, § 170.

15. *Rosenthal v. Bauer*, 30 Cal. App. 277, 157 Pac. 1137.

its terms will bear, and if he is refused relief under that construction, and the other party will not be prejudiced by a change of plaintiff's claim, the plaintiff will still be at liberty to contend for that which is his lawful right.¹⁶ It may be noted in this connection that

"A condition involving a forfeiture must be strictly construed against the party for whose benefit it is created."¹⁷

Contract between private party and the public.—As an exception to the general rule, section 1654 of the Civil Code provides that where uncertainty exists in a contract between a private party and a public officer or body, as such, the uncertainty is presumed to be caused by the private party, and the contract must be interpreted most strongly against the private party.¹⁸ But it is only in cases of uncertainty, "not removed by the preceding rules of interpretation," that this section requires such contracts to be so interpreted,¹⁹ and it has been held that, under a contract between a county and a private contractor, the county being required to furnish well casing, there was an implied covenant that the casing should be proper and suitable for the intended purpose and that no presumption should be indulged, under section 1654 of the Civil Code to overcome an implication so obviously just.²⁰

§ 186. Law as Part of Contract.—Everyone is presumed to know the law.¹ And all applicable laws in existence

16. *Stein v. Leeman*, 161 Cal. 502, 119 Pac. 663. See *ESTOPPEL*.

17. Civ. Code, § 1442; *Downing v. Cutting Packing Co.*, 183 Cal. 91, 190 Pac. 455; *Jameson v. Chanslor Canfield etc. Oil Co.*, 176 Cal. 1, 167 Pac. 369; *Randol v. Scott*, 110 Cal. 590, 42 Pac. 976; *Exchange Securities Co. v. Rossini*, 30 Cal. App. Dec. 732, 186 Pac. 828. See *infra*, § 218.

18. *Miller v. Grunaky*, 141 Cal. 441, 75 Pac. 48; *McPherson v. San Joaquin County*, 6 Cal. Unrep. 257, 56 Pac. 802.

19. *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222.

20. *McPherson v. San Joaquin County*, 6 Cal. Unrep. 257, 56 Pac. 802.

1. *Boehm v. Spreckels*, 183 Cal. 239, 191 Pac. 5 (contract of

when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms." Section 1656 of the Civil Code states that

"All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."'

agency); *Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817 (arbitration agreement); *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365 (sale of structural steel). And see *Maguire v. Reardon*, 41 Cal. App. 596, 183 Pac. 303 (holding that a contract in reference to a building erected in violation of regulations is deemed to have been made with knowledge of that fact). See EVIDENCE.

2. *Chapman v. Jocelyn*, 182 Cal. 294, 187 Pac. 962 (street assessment); *Hub Hardware Co. v. Aetna Accident etc. Co.*, 178 Cal. 264, 173 Pac. 81 (contract of surety); *Hollenbeck-Bush Planing Mill Co. v. Amweg*, 177 Cal. 159, 170 Pac. 148 (building contract); *Neale v. Morrow*, 150 Cal. 414, 88 Pac. 815 (promissory note given as part of guarantee fund of insurance company as required by law); *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964 (contract of sale, time and place of delivery not expressed); *Welsh v. Cross*, 146 Cal. 621, 106 Am. St. Rep. 63, 2 Ann. Cas. 796, 81 Pac. 229 (statute with reference to redemption of property sold under execution construed as part of contract); *Neale v. Head*, 133 Cal. 42, 65 Pac. 131, 576 (promissory note given as part of guarantee fund of insurance

company as required by law); *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Stohr v. San Francisco Musical Fund Society*, 82 Cal. 557, 22 Pac. 1125 (contract of mutual benefit society with member); *Houston v. McKenna*, 22 Cal. 550 (street assessment); *Oreighton v. Pragg*, 21 Cal. 115 (street assessment); *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638; *Bailey etc. Iron Co. v. Goldschmidt*, 33 Cal. App. 661, 166 Pac. 363 (building contract); *Marshall v. Wentz*, 28 Cal. App. 540, 163 Pac. 244 (the court declaring that when the defendant acquired his stock and became a member of the corporation, all the provisions of the Civil Code declaring under what circumstances, for what purposes, and how the directors might levy assessments and the methods they might pursue in collecting them, entered into and became a part of his contract relation with it); *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938; *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948.

3. *Gonzalez v. Gonzalez*, 174 Cal. 588, 163 Pac. 993; *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362; *Brickell v. Batchelder*, 62 Cal. 623 (mortgage); *Van Loben Sels v. Producers' Fruit Co.*, 36 Cal. App. 201,

Section 1646 of the Civil Code reads as follows:

"A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."⁴

Hence, the courts must read as a part of a contract the laws of the state existing at the time it was made.⁵ It is to be construed according to the *lex loci rei sitae* as to the sufficiency of its formal execution and as to the interpretation of its parts.⁶ It would be idle for the parties to say, expressly, that they incorporate into their agreement the law then existing.⁷ The parties are presumed to have had the law in view, although sometimes the terms of the contract will rebut this presumption.⁸ This rule, of course, applies as well to constitutional provisions as to statutes.⁹

Section 1 of article XII of the constitution provides that

"All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

And it is settled that this reserve power to alter or repeal corporation charters becomes a part of the contract of every stockholder of corporations organized there-

179 Pac. 403 (lease of farm lands); Spangenberg v. Spangenberg, 19 Cal. App. 439, 126 Pac. 379 (contract by heirs apparent to pool and equally divide bequests).

4. Platner v. Vincent, 33 Cal. App. Dec. 407; Blochman etc. Bank v. Ketcham, 36 Cal. App. 284, 171 Pac. 1084; Corey v. Struve, 16 Cal. App. 310, 116 Pac. 975; Estate of Campbell, 12 Cal. App. 707, 108 Pac. 669, 676. See CONFLICT OF LAWS.

5. Allen v. Allen 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213; Frank v. Crescent Wharf & Warehouse Co., 33 Cal. App. Dec. 729, 195 Pac.

79; Weinreich Estate Co. v. A. J. Johnston Co., 28 Cal. App. 144, 151 Pac. 667.

6. Platner v. Vincent, 33 Cal. App. Dec. 407. See CONFLICT OF LAWS, vol. 5, p. 449.

7. Robinson v. Magee, 9 Cal. 81, 70 Am. Dec. 638; Biggerstaff v. Briggs, 2 Cal. Unrep. 339, 4 Pac. 371.

8. Brown v. Kling, 101 Cal. 295, 35 Pac. 995.

9. Hollenbeck-Bush Planing Mill Co., v. Amweg, 177 Cal. 159, 170 Pac. 148; Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 91 Pac. 262.

under.¹⁰ If a contract is clear and complete when aided by that which is imported into it by legal implication, it cannot be contradicted by parol evidence in respect of that which is implied, any more than with respect to that which is written.¹¹

The understanding of the law at the time of the settlement of a contract, though erroneous, will govern, and the subsequent determination of the question of law by judicial decision to the contrary does not create such a mistake of law as courts will rectify; nor can it have a retroactive effect to overturn the settlement which was legal and valid when made.¹² However, the decisions of the supreme court do not make or change the law, but simply declare what the law is, and overruled decisions, not having stated the law correctly as declared in later cases, cannot be considered as forming part of a contract executed after the making of the earlier decisions, and before they were overruled, and do not furnish the true rule of interpretation thereof.¹³ As the law enters into a contract, and forms a part of it, the obligation of the contract must depend upon the law existing at the time it was made.¹⁴

Statutes impairing obligation.—Where a contract is complete and operative the legislature cannot, by a subsequent act, impair its obligation, by requiring the performance of other conditions, not required by the law of the contract itself. The rights, as well as the intentions,

10. *Matter of College Hill Land Assn.*, 157 Cal. 596, 108 Pac. 681 (citing authorities). See CORPORATIONS.

11. *Standard Box Co. v. Mutual Biscuit Co.*, 16 Cal. App. 746, 103 Pac. 938; *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948.

12. *Cooley v. County of Calaveras*, 121 Cal. 482, 53 Pac. 1075 (holding settlement by justice of the peace with county for fees

pursuant to act of legislature prior to decision of supreme court declaring act unconstitutional could not be revoked).

13. *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213; *Kenyon v. Welty*, 20 Cal. 637, 81 Am. Dec. 137.

14. *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638. And see *supra*, § 5.

of the parties, are fixed and ascertained by the existing law. Therefore, to require the performance of other conditions, to make the contract operative, is to impair its obligation. The power to impose conditions, after the contract is once complete and perfect, is nothing but the power to impair its obligation,¹⁵ and this the constitution has prohibited.¹⁶ However, the legislature has power to give to statutes a retrospective operation, if they are not ex post facto, and do not impair the obligation of contracts, or deprive anyone of vested rights. Yet it is to be presumed that no statute is intended to have such effect, unless the contrary clearly appears, and especially so where to give the statute retrospective effect would work manifest injustice.¹⁷

Foreign law.—The parties to a contract may agree to be bound by the law of a foreign jurisdiction, and such law will then be enforced in the forum where the parties reside.¹⁸ Moreover, when a contract is made with reference to the laws of a jurisdiction other than that of the place of contracting, the parties will be deemed to have incorporated into their agreement the law of the jurisdiction with reference to which they were contracting.¹⁹

Repealed statutes.—When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action

15. *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638.

16. Const., art. I, § 16; *Chapman v. Jocelyn*, 182 Cal. 294, 187 Pac. 962. See CONSTITUTIONAL LAW, vol. 5, p. 759 et seq.

17. *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48. See CONSTITUTIONAL LAW, vol. 5, p. 747 et seq.

18. *Boole v. Union Marine Ins. Co.*, 34 Cal. App. Dec. 970, 198 Pac. 416.

19. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942 (citing and quoting *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125, 22 Sup. Ct. Rep. 52, see, also, *Rose's U. S. Notes*). See CONFLICT OF LAWS, vol. 5, p. 450.

for its enforcement. It has become a vested right which stands independent of the statute.²⁰

§ 187. Custom as Part of Contract.—Parties who contract on a subject matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.¹ Evidence may be given of usage to explain the true character of a contract or instrument, where such true character is not otherwise plain. In such case usage is an instrument of interpretation.² The rule has also been stated as fol-

20. *Creighton v. Pragg*, 21 Cal. 115; *Pacific Mail S. S. Co. v. Joliffe*, 69 U. S. (2 Wall.) 450, 17 L. Ed. 805, see, also, *Rose's U. S. Notes* (construing pilotage act of May 20, 1861). See CONSTITUTIONAL LAW, vol. 5, p. 783 et seq.

1. Civ. Code, § 1656 (quoted supra, § 186; *Union Ins. Co. v. American Fire Ins. Co.*, 107 Cal. 327, 48 Am. St. Rep. 149, 28 L. R. A. 692, 40 Pac. 431; *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995 (construing contract in restraint of trade); *Anzerals v. Naglee*, 74 Cal. 60, 15 Pac. 371 (upholding custom of merchants to charge interest on monthly balances); *Taylor v. Castle*, 42 Cal. 367 (usage of partnership firm in conducting business taken as part of contract); *Brown v. Howard*, 1 Cal. 423 (charter-party); *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975 (lease of land for sugar-beets); *Puritas Laundry Co. v. Green*, 15 Cal. App. 654, 115 Pac. 660 (agreement to recompense drivers for claims for losses duly established by customers); *Robinson v. United States*, 80 U. S. (13 Wall.) 363, 20 L. Ed. 653, see, also, *Rose's U. S. Notes* (sale of grain). As to banking usages and customs, see BANKS, vol. 4, p. 104. And see, generally, USAGES AND CUSTOMS.

2. Civ. Code, § 1646 (quoted supra, § 186); Code Civ. Proc., § 1870, subd. 12; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916 (employment of stevedores); *Callahan v. Stanley*, 57 Cal. 476 (evidence of usage among farmers as to meaning of word "stubble" allowed); *Gash v. Hammer*, 36 Cal. App. Dec. 601 (sale of produce); *Brett v. Vanomar Producers*, 31 Cal. App. Dec. 33, 187 Pac. 758 (sale of bean crop); *Yoshizumi v. Platt Produce Co.*, 30 Cal. App. Dec. 260, 185 Pac. 689 (evidence of custom in matter of getting boats to move produce held admissible); *Meyer v. Sullivan*, 40 Cal. App. 723, 181 Pac. 847 (evidence of usage and custom considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the f. o. b. clauses of the contracts); *Standard American Dredging Co. v. Oakland*, 30 Cal. App. 237, 157 Pac. 833 (contract for dredging work); *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975; *Puritas Laundry Co. v. Green*, 15 Cal. App. 654, 115 Pac. 660; *Ellsworth v. Knowles*, 8 Cal. App. 630, 97 Pac. 690 (sale of fruit); *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365; *Fish v.*

lows: "Evidence of usage is admitted to annex incidents to contracts where it is apparent that the parties have omitted to state important parts of their agreements, and the incident so annexed is consistent with the express terms and its inclusion can fairly be presumed to have been intended by the parties."³ But usage is admissible only as an instrument of interpretation.⁴ Usage should not be regarded at all, unless it be of such a character as may be supposed to have influenced parties; and none can be ordinarily presumed to do this, but such as is public and continued.⁵ A usage, of course, cannot be given in evidence to relieve a party from his express stipulation, or to vary a contract certain in its terms.⁶ It has been said that the gate to a limitless field for the exercise of chicanery and deceit would be opened if parties were permitted to nullify a contract by evidence of a custom at variance with its terms.⁷ When a contract

Correll, 4 Cal. App. 521, 88 Pac. 489; Robinson v. United States, 80 U. S. (13 Wall.) 363, 20 L. Ed. 653, see, also, Rose's U. S. Notes.

3. Corey v. Struve, 16 Cal. App. 310, 116 Pac. 975 (quoting Am. & Eng. Ency. Law).

4. Subd. 12, § 1870, Code Civ. Proc.; Withers v. Moore, 140 Cal. 591, 74 Pac. 159; Rottman v. Hevener, 36 Cal. App. Dec. 355; Gero v. Richey, 38 Cal. App. 21, 175 Pac. 91; Loyaltan Electric Light Co. v. California Pine Box etc. Co., 22 Cal. App. 75, 133 Pac. 323.

5. Schroeder v. Schweizer Lloyd Transport etc., 66 Cal. 294, 5 Pac. 478.

6. Withers v. Moore, 140 Cal. 591, 74 Pac. 159; Milwaukee etc. Ins. Co. v. Palatine Ins. Co., 128 Cal. 71, 60 Pac. 518; Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 Pac. 7; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Holloway v. McNear, 81

Cal. 154, 22 Pac. 514 (charter-party); Rottman v. Hevener, 36 Cal. App. Dec. 355; A. E. G. Bue Co. v. White Auto Co., 34 Cal. App. Dec. 923, 61 Cal. Dec. 654, 198 Pac. 829 (sale of automobile); Gero v. Richey, 38 Cal. App. 21, 175 Pac. 91; Standard American Dredging Co. v. Oakland, 30 Cal. App. 237, 157 Pac. 833; Hale Bros. v. Milliken, 5 Cal. App. 344, 90 Pac. 365; Fish v. Correll, 4 Cal. App. 521, 88 Pac. 489; Robinson v. United States, 80 U. S. (13 Wall.) 363, 20 L. Ed. 653, see, also, Rose's U. S. Notes.

7. Fish v. Correll, 4 Cal. App. 521, 88 Pac. 489 (holding that in an action upon an express written contract, unambiguous in its terms, to erect a tombstone or sarcophagus all of Scotch granite, with bases of fixed dimensions, to be erected in a specified month, or within a reasonable time thereafter, no custom to build a foundation

is entered into with reference to rules not rules or usages of trade and commerce, such rules become in effect special terms of the contract, and must be pleaded by the party who claims that he has performed in accordance with them, or that the other party has failed to comply with them.⁸ If a contract is susceptible of a reasonable interpretation without incorporating in it any extrinsic provisions by evidence of usage or custom, error in ruling on the admission of such evidence is not prejudicial.⁹

§ 188. Express Provisions of Law to Prevail Over Custom or Usage.—The legislature has established a standard of weights and measures, according to which, by the provisions of section 3222 of the Political Code, “all contracts made in this state for work to be done or for anything to be sold or delivered by weight or measure,” must be construed. In giving effect to this provision in the construction of a contract to furnish structural steel in preference to a prevailing usage among manufacturers of and dealers in steel, the court has used the following pertinent language:

“The legislature certainly meant something by the enactment of the law regulating weights and measures, and the rule involved in section 1861, Code of Civil Procedure, should not be so applied as to operate, practically, to repeal or nullify the entire chapter upon the subject of weights and measures. . . . We think the rule of construction of such contracts ought to be, as contemplated by the legislature, that they are to be conclusively presumed to have been made in reference to the statute, unless the parties themselves have agreed or indicated in their contracts that their execution is to be governed by some usage of trade or custom prevailing in the community where they were made, or their terms are to be performed. Such a construction would give force and effect to the

of different granite is admissible to vary its terms).

8. *Goldsmith v. Sawyer*, 46 Cal. 209.

9. *Standard American D. Co. v. Oakland*, 30 Cal. App. 237, 157 Pac.

833. See USAGES AND CUSTOMS.

statute and could not interfere with the operation in appropriate cases of section 1861 and other code provisions established for the interpretation of contracts whose terms are expressed in doubtful or ambiguous language."¹⁰

§ 189. Terms Implied as Part of Contract.—As has already been seen, under the provisions of the Civil Code all things in law or usage which are considered incidental to a contract, and necessary to carry it into effect, are implied to be a part thereof.¹¹ The Civil Code also provides that

“Stipulations which are necessary to make a contract reasonable or conformable to usage, are implied in respect to matters concerning which the contract manifests no contrary intention.”¹²

10. *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365 (referring to the case of *Higgins v. California Petroleum etc. Co.*, 120 Cal. 629, 52 Pac. 1080, wherein parol evidence was admitted for the purpose of showing that by the usage of the place where the contract was made, the words “gross ton” as used in the contract meant a “long ton,” the court said: “We are not to be understood as questioning the ruling in the *Higgins v. California Petroleum etc. Co.* case, 120 Cal. 629, 52 Pac. 1080, in so far as it concerns the application of section 1861, Code of Civil Procedure, to the peculiar circumstances of that case. But we do think that the decision unnecessarily lays down the rule too broadly, and we have no hesitation in declaring that if the language of the opinion is to be interpreted as holding the rule to be of such indiscriminate and universal application in the matter of the interpretation of express contracts as to embrace all manner of such instruments, regardless of the language in which

they are expressed, and including those which, in certain respects, the legislature has provided must be construed according to other rules adopted by it for that purpose, then we feel constrained to say that we cannot subscribe to it”). See **WEIGHTS AND MEASURES.**

11. See *supra*, §§ 186, 187.

12. Civ. Code, § 1655; *Charles Boldt Co. v. Julius Levin Co.*, 41 Cal. App. 661, 183 Pac. 200 (time for performance); *Armstrong v. Sacramento Valley Realty Co.*, 34 Cal. App. Dec. 884, 198 Pac. 217; *Biggerstaff v. Briggs*, 2 Cal. Unrep. 339, 4 Pac. 371. See *supra*, § 169, as to reasonableness of construction. See *Humphry v. Farmers' Union & Milling Co.*, 32 Cal. App. Dec. 35, 190 Pac. 489 (holding contract of sale consummated where minds of parties had met upon all the terms and conditions except one which would have been added by implication of law, in any event).

In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed in accordance with the terms of the contract without interference by the owner, and that he shall be given such possession of the premises as will enable him to carry on the construction and complete the work. Such terms are necessarily implied from the very nature of the contract, and a failure to observe them, not consented to by the contractor, constitutes a breach of contract on the part of the owner entitling the contractor to rescind, although it may not amount to a technical prevention of performance.¹³ A contract to construct a sewer in front of a lot, without a permit from the street superintendent, being in violation of a city ordinance, and constituting a misdemeanor, is unlawful, and cannot form the basis of a civil action, but the agreement will be construed, where the contrary is not expressed, as implying a condition that the permit shall be obtained, and as being an inchoate agreement, which would become valid and binding only in case such permit should be issued.¹⁴ Similarly, under a contract for the construction of a pipe-line over a fixed and determined route, the law implies a covenant on the part of the owner either that he possess or will procure a right to construct such pipe-line over the route specified. No duty devolves upon the contractor, in the absence of an express agreement, to procure the right to cross an intervening railroad right of way, and if performance by the contractor be delayed beyond the time stipulated by reason of the owner's failure to acquire the right to cross such right of way, no right of action accrues to the owner for damages for the delay.¹⁵ Where no time is expressed on a sale of goods, the law implies an agree-

13. *Gray v. Bekins*, 62 Cal. Dec. 44, 199 Pac. 767, per Lennon, J.

14. *Smith v. Luning Co.*, 111 Cal. 308, 43 Pac. 967.

15. *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 Pac. 980.

ment to deliver within a reasonable time.¹⁶ And it is unnecessary to allege, in an action upon a contract, that stipulations necessary to make a contract reasonable and not expressed therein are a part thereof.¹⁷ But where parties have entered into an agreement which expresses the obligations which each is to assume, courts are reluctant to enlarge it by implication as to important matters. The presumption is that, having expressed some, they have expressed all of the conditions.¹⁸

§ 190. Matters Annexed to Contract or Referred to Therein.—All written contracts refer to matters dehors the instrument, but such matters, except where the matter referred to is another writing, do not become a part of the instrument. Thus monuments and natural objects called for in a deed cannot with any propriety be said to be part of the deed. Nor, where goods are sold or contracted to be sold by sample, can the sample be said to be part of the contract, though conformity to sample doubtless is. And the case is not different where work is contracted to be done according to a specified pattern or sample.¹⁹ But, as heretofore indicated, a written agreement may, by reference expressly made thereto, incorporate other written agreements; and when such reference is made the original agreement and those referred to must be considered and construed as a whole.²⁰ Actual annexation is not essential to a merger by reference of

16. *Jones & McLaughlin etc. Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290. And see *infra*, §§ 207-209. And see **SALES**.

17. *Biggerstaff v. Briggs*, 2 Cal. Unrep. 339, 4 Pac. 371 (holding not necessary to allege, as part of contract, that ditching machine should be so employed as not to injure defendant's grape-vines). See *Ontario D. F. G. Assn. v. Cutting F. P. Co.*, 134 Cal. 21, 66 Pac. 28, to the effect that it is not prejudicial error

to admit parol evidence to prove that which is an implied condition of a contract.

18. *Loyalton etc. Light Co. v. California etc. Lumber Co.*, 22 Cal. App. 75, 133 Pac. 323.

19. *California Iron Construction Co. v. Bradbury*, 138 Cal. 328, 71 Pac. 316, per Smith, C.

20. *Beedy v. San Mateo Hotel Co.*, 27 Cal. App. 653, 150 Pac. 810. See *supra*, §§ 181, 182.

separately executed written instruments.¹ When a building or construction contract requires work to be done according to certain described plans and specifications, they are an essential part of the contract though not attached.² But the reference to them must be such that they can be identified. No plans or specifications which do not correspond with the reference can be shown to be those intended by the parties.³ The reference is fully satisfied by pages of specifications and sheets of drawings fastened together and annexed to the contract and signed on the last page thereof by the parties.⁴ Applying the rule of construction that that is certain which can be made certain from the inspection of instruments forming part of one whole, it is sufficient that it can be determined with certainty from the inspection of plans and specifications attached to a contract, and filed together with it, that they are referred to and identified therein.⁵

Under section 1183 of the Code of Civil Procedure as it stood prior to its amendment in 1911, requiring the filing and recording of building contracts which involved the payment of more than one thousand dollars, it was held that a building contract referring to certain plans and specifications was void when they could not be found.⁶ The present section 1183 of the Code of Civil Procedure

1. *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. 53; *Beedy v. San Mateo Hotel Co.*, 27 Cal. App. 653, 150 Pac. 810.

2. *Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009; *Gray v. Cotton*, 166 Cal. 130, 134 Pac. 1145 (holding plans and specifications, by reference, became part of subcontract); *Woollacott v. Meekin*, 151 Cal. 701, 91 Pac. 612 (reference to specifications on file); *Taylor v. Palmer*, 31 Cal. 240.

3. *West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533; *Worden v. Hammond*, 37 Cal. 61.

4. *Howe v. Schmidt*, 151 Cal. 436, 90 Pac. 1056.

5. *Hartwell v. Ganahl Lumber Co.*, 8 Cal. App. 733, 97 Pac. 901.

6. *Burnett v. Glass*, 154 Cal. 249, 97 Pac. 423; *Howe v. Schmidt*, 151 Cal. 436, 90 Pac. 1056; *West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533; *Donnelly v. Adams*, 115 Cal. 129, 46 Pac. 916; *Hartwell v. Ganahl Lumber Co.*, 8 Cal. App. 733, 97 Pac. 901. And see *supra*, §§ 157 and 158, as to recording of building contracts.

requires the filing of a building contract accompanied by the contractor's bond as a condition precedent to the limitation of the owner's liability to the contract price. Under this provision, a failure to file plans and specifications incorporated into a contract by reference permits the lien claimants to recover from the owner the full amount of their unpaid claims although in excess of the contract price.⁷

Where, in a contract, reference is made to another writing for a particular specified purpose, such other writing becomes a part of the contract for such purpose only.⁸

§ 191. Entire and Severable Contracts.—A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and interdependent. On the other hand, a severable contract has been defined to be one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor intended by the parties that they shall be.⁹⁻¹⁰

The question as to whether a contract is entire or severable is one that is sometimes difficult to determine.¹¹

7. *Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009. See **MECHANICS' LIENS**.

8. *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220.

9-10. The above rule is announced in the leading case, *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736, and is quoted and held to be correct in *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305, and *Fontaine v. Lacassie*, 36 Cal. App. 175, 171 Pac. 812 (holding contract entire). See, also, *Mott v. Wright*, 43 Cal.

App. 21, 184 Pac. 517 (quoting authorities). See *supra*, § 95 et seq., as to divisibility of contracts in restraint of trade; § 105, as to effect of partial illegality of contracts.

11. *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305; *Pacific Wharf & Storage Co. v. Standard American D. Co.*, 184 Cal. 21, 192 Pac. 847. See *Jones & Laughlin Steel Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290 (doubt expressed as to whether contract was entire as to either of three structures involved).

No precise rule can be laid down for its solution, but it must be determined by considering both the language and the subject matter.¹² The question is one of interpretation to be determined by the court, according to the intention of the parties, upon consideration of all the circumstances.¹³ The divisibility of the contract does not alone depend upon the multiplicity or the separability of the items therein, but upon the intention of the parties and the object of the contract. If it was the intention to treat the contract as an entire one, and it appears that their engagements would not have been entered into except upon the understanding that the full object should be performed, the contract is not divisible, and the parties will not be allowed, under those circumstances, to perform part and default as to other parts without being held answerable for the performance of the entire contract.¹⁴

A contract for the sale of different kinds of personal property at an agreed price for different items is severable, unless the taking of the whole is essential from the character of the property, or is made so by the agreement, or unless the transaction is of such a nature that a failure to obtain a part of the articles would materially affect its objects, and thus have influenced the sale, had such

12. *City Carpet etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Porter v. Fisher*, 4 Cal. Unrep. 324, 3 Pac. 700.

13. *Los Angeles Gas etc. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55 (holding a contract whereby seller agrees to sell and deliver to purchaser and latter agrees to purchase and receive, for period of years, all oil required in business at fixed price payable monthly, to be entire); *Goorberg v. Western Assur. Co.*, 150 Cal. 510, 119 Am. St. Rep. 246, 11 Ann. Cas. 801, 10 L. R. A. (N. S.) 876, 89

Pac. 130 (construing policy insuring several classes of property); *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305; *Mitchell v. Samuels*, 39 Cal. App. 134, 178 Pac. 336 (contract for management of hotel with one-year option to purchase containing provision for services as manager for additional year in event of failure to exercise option).

14. *Stern v. Sunset Road Oil Co.*, 32 Cal. App. Dec. 145, 190 Pac. 651 (holding entire a contract for sale and delivery of all oil required for use of railroad company for five years, part to be delivered for storage and part for current use).

failure been anticipated.¹⁵ And where several things are to be done, if the consideration to be paid is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent.¹⁶ But this rule is not universal. It is subject to the limitation that a contract will be treated as entire, even when the obligations of the one party consist of different acts to be separately paid for, where the character of the agreement shows that it was intended to be entire.¹⁷

When parties enter into a contract by which the acts to be performed by one, and the consideration to be paid by the other are made certain and fixed, the contract

15. *Los Angeles Gas etc. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55 (holding contract for all oil used by one party to be paid for monthly and covering period of years was entire); *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305 (upholding finding that contract for sale of oranges of three groves at different prices was entire); *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27 (sale of hides, tallow, etc.); *Field v. Austin*, 131 Cal. 379, 63 Pac. 692 (sale of business and stock of corporation); *Norris v. Harris*, 15 Cal. 226 (holding contract for sale of slaves for gross sum entire).

Contract for sale of goods as entire or divisible, note, 2 A. L. R. 643. Divisibility of contract to furnish material for a specific construction, note, 2 A. L. R. 687. Divisibility of contract for the sale of an outfit, plant, or machinery, note, 4 A. L. R. 1442. See SALES.

16. *Pacific Wharf & Storage Co. v. Standard American D. Co.*, 184 Cal. 21, 192 Pac. 847 (contract for sale of dredge containing covenant not to engage in dredging business at certain places); *Los Angeles Gas*

etc. Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 Pac. 55; *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305 (holding contract under consideration not to be severable); *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Mott v. Wright*, 43 Cal. App. 21, 184 Pac. 517 (on petition for rehearing); *Rockwell v. Light*, 6 Cal. App. 563, 92 Pac. 649 (contract for painting different houses at specified prices for each is severable); *Porter v. Fisher*, 4 Cal. Unrep. 324, 34 Pac. 700 (contract for employment of broker to sell both real and personal property held severable). And see *Law v. San Francisco Gas etc. Co.*, 168 Cal. 112, Ann. Cas. 1915D, 842, 142 Pac. 52 (holding that a contract which obligates the promisor, for a specified time, to furnish steam for heating three separate buildings belonging to the promisee, is not of such a character that it may not be divided by consent of the parties).

17. *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55.

cannot be apportioned.¹⁸ A contract for the sale of personal property is clearly entire when a gross sum is fixed for the whole number of articles, and no means of determining the price for each one is afforded.¹⁹ And a contract for a fixed quantity of personal property is indivisible notwithstanding it is to be delivered and paid for in installments.²⁰ An agreement for the storage of hay in a warehouse for a specified season is an entire contract, even though it contains a provision that the warehouse owner will not be responsible for loss or damage to hay from fire.¹ In suit to recover for services for half a year, under a contract to work a whole year, the plaintiff having quit the employment of the defendant, it has been declared that it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover.²

Building and construction contracts.—A building, construction or working contract is entire, and not divisible, where it is for an entire structure for a stated compensation. But if the price is apportioned among the several

18. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (contract employing agents to sell several lots at separate price for each lot, for aggregate commission, is entire contract where by its terms agents not entitled to anything but amount for advances until entire contract is performed); *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206 (contract to convey real estate and pay money in consideration of services of plaintiff); *People v. Brooks*, 16 Cal. 11 (lease of state prison grounds and convict labor at certain monthly price); *Ord v. Steamer Uncle Sam*, 13 Cal. 369 (holding entire contract for transportation of passengers via water from San Francisco to New York, whether entire voyage is to be performed in one vessel or not).

19. *Perry v. Ayers*, 159 Cal. 414, 114 Pac. 46; *Norris v. Harris*, 15 Cal. 226 (sale of slaves). See SALES.

20. *Los Angeles Gas etc. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55 (contract to buy all oil required in business at fixed price payable monthly); *Dwight v. Callaghan*, 35 Cal. App. Dec. 364, 199 Pac. 838; *Karales v. Los Angeles Creamery Co.*, 36 Cal. App. 171, 171 Pac. 821 (contract to deliver milk daily for period of three months); *Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 252, 90 Pac. 51.

1. *Cunningham v. Kenney*, 105 Cal. 118, 45 Am. St. Rep. 30, 38 Pac. 645. See WAREHOUSES.

2. *Hogan v. Titlow*, 14 Cal. 255, See MASTER AND SERVANT.

items, or to the different parts of one item, the contract will generally be construed as severable.³ Where a contractor agrees to do certain work, as the grading of a certain section of railroad,⁴ the construction of a certain part of a canal, or of a tunnel⁵ or building,⁶ even though the contract may provide for progress payments, it is entire and the provision for progress payments does not make it divisible. An agreement to build a sidewalk is not entire when the quantity to be built is left blank in the written contract, and there is no attempt to reform the instrument.⁷

§ 192. Functions of Courts.—Courts enforce contracts as made, unless good morals or public policy are contravened.⁸ They cannot create a new contract, nor can they permit the parties themselves to do so without the consent of all, upon any theory that the original contract was not the most beneficial or advantageous, or that the enterprise contemplated by its terms cannot be successfully operated under it.⁹ Courts are not permitted to

3. *Mott v. Wright*, 43 Cal. App. 21, 184 Pac. 517 (the court declaring, on petition for rehearing, that contract was severable).

4. *Cox v. Western Pac. R. R. Co.*, 44 Cal. 18; *Id.*, 47 Cal. 87; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929.

5. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929.

6. *Steere v. Formilli*, 38 Cal. App. 194, 175 Pac. 806 (citing *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640; *Keeling v. Schastey & Vollmer*, 18 Cal. App. 764, 124 Pac. 445; *American-Hawaiian E. & C. Co. v. Butler*, 17 Cal. App. 764, 121 Pac. 709).

7. *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523.

8. As to illegal contracts, see *supra*, §§ 58-112.

9. *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303; *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58 (decision of department in same case, reported in 6 Cal. Unrep. 101, 54 Pac. 80, not sustained); *Durst v. Jolly*, 35 Cal. App. 184, 169 Pac. 449; *Bretthauer v. Foley*, 15 Cal. App. 19, 113 Pac. 356.

And see Code Civ. Proc., § 1858, which provides as follows: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are sev-

insert words not used by the parties themselves. To do so, it has been said, would be to make contracts, not to read them.¹⁰ Nor can terms not a part of a contract be read into it,¹¹ and the court cannot say that anything is immaterial which the parties have made material.¹² Whether a contract is in any of its terms ambiguous or uncertain is a matter of determination in the first instance by the trial court. If it is found so to be, it is primarily the duty of such court to construe it, after a full opportunity afforded the parties to produce evidence of the facts, circumstances and conditions surrounding its execution, and the conduct of the parties relative thereto. Until so construed, and the accuracy of the determination of the trial court is directly questioned on appeal, the supreme court should not in the first instance undertake to construe it so that its determination would operate as the law of the case on a new trial.¹³ And where a writing is so uncertain that either of the two constructions urged might be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by the other construction of which the instrument is susceptible.¹⁴ It is held that where the only error into which the trial court fell in rendering judgment was an improper construction, a new trial is not necessary, but that the judgment will be reversed with directions to enter judgment in accordance with the construction expressed by the appellate court.¹⁵ Where there is conflicting evidence

eral provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." See *COURTS*.

10. *Hawley v. Brumagim*, 33 Cal. 394 (sale of stock). 'As to interpretation according to language used, see *supra*, § 170.

11. *Boyd v. Model Grocery Co.*, 24 Cal. App. 113, 140 Pac. 309.

12. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740 (commented on

in *Joseph Musto Sons-Keenan Co. v. Pacific States Corp.*, 32 Cal. App. Dec. 797, 192 Pac. 139).

13. *Barlow v. Frink*, 171 Cal. 165, 152 Pac. 289, per Lorigan, J.

14. *Slama Tire Protector Co. v. Ritchie*, 31 Cal. App. 555, 161 Pac. 25.

15. *Scudder v. Pette*, 159 Cal. 429, 114 Pac. 571. See *APPEAL AND ERROR*, vol. 2, p. 984 et seq.

upon issue joined as to the terms of the contract, and the defendant's version is adopted by the jury, its verdict upon that issue is conclusive upon appeal.¹⁶

§ 193. Relative Functions of Court and Jury.—The interpretation in the first instance of an oral contract is a question of fact for the jury; although, if their interpretation is clearly erroneous, it becomes the duty of the trial court, upon application therefor, to set the verdict aside.¹⁷ The construction of a written contract, where that construction is to be arrived at from a mere reading of the agreement itself, or from such reading aided by extrinsic evidence of circumstances and the like, is generally a question of law.¹⁸ Whether a contract contains language importing a complete contract is a question for the court, and is to be determined from an inspection of the instrument.¹⁹ In an action growing out of an agreement made by letters, it is the duty of the court to construe those letters and determine whether they constitute a contract.²⁰ And where extrinsic evidence is introduced to

16. *Guild Gold Mining Co. v. Mason*, 115 Cal. 95, 46 Pac. 901.

17. *Smyth v. Tennison*, 24 Cal. App. 519, 141 Pac. 1059.

18. Code Civ. Proc., § 2102; *California Well Drilling Co. v. California Midway Oil Co.*, 178 Cal. 337, 177 Pac. 849; *Thompson, Estate of*, 165 Cal. 290, 131 Pac. 1045; *Nilts v. Hancock*, 140 Cal. 157, 73 Pac. 840; *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Holloway v. McNear*, 81 Cal. 154, 22 Pac. 514; *Norddeutschen etc. v. Bertheau*, 79 Cal. 495, 21 Pac. 975; *Swain v. Grangers' Union etc. Co.*, 69 Cal. 186, 10 Pac. 404; *Aguirre v. Alexander*, 58 Cal. 21; *Luckhart v. Ogden*, 30 Cal. 547; *Reynolds v. Jourdan*, 6 Cal. 108; *Todd v. Lyon*, 36 Cal. App. Dec. 617; *O'Connor*

v. West Sacramento Co., 35 Cal. App. Dec. 857; *Lewis v. Farmers' Grain & Milling Co.*, 34 Cal. App. Dec. 985, 198 Pac. 426; *Holtman v. Butterfield*, 34 Cal. App. Dec. 315, 190 Pac. 85; *Brett v. Vanomar Producers*, 31 Cal. App. Dec. 33, 187 Pac. 758; *McPherson v. Great Western Milling Co.*, 30 Cal. App. Dec. 669, 186 Pac. 803; *Mickel v. Althouse*, 38 Cal. App. 321, 176 Pac. 51; *Pearson v. M. M. Potter Co.*, 10 Cal. App. 245, 101 Pac. 681.

19. *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 904; *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830; *Stephan v. Lagerqvist*, 35 Cal. App. Dec. 85, 199 Pac. 52. See, also, Code Civ. Proc., § 1858.

20. *Wristen v. Bowles*, 82 Cal. 84,

aid in construction, it may still be the duty of the court to construe the contract in the light of such evidence.¹ But when the construction is doubtful and depends upon extrinsic evidence, there may be a conflict in the extrinsic evidence itself, in which case the determination of that conflict results in a finding of pure fact.² If extrinsic facts are disputed, the jury must, of course, pass upon them.³ Thus, where the contract is uncertain or not clear as to its purpose and effect, the question whether the transaction involved is a sale or a bailment is to be determined from the circumstances, and on conflicting evidence a question is presented for the jury.⁴ And where the agreement is evidenced by letters, it is the province of the jury to determine whether they were written and received by the respective parties, and the terms of the contract therein contained complied with.⁵

The terms of a contract being ascertained, the court should construe it and instruct the jury as to its meaning and effect.⁶ The rule that the construction of a written contract is for the court is, however, frequently departed from, where it relates to the mechanic or scientific arts. In such cases it is customary to admit the opinions of experts to explain the contract, and where the evidence otherwise tends to limit or enlarge the apparent meaning of the words used, the opinions of witnesses, who are in the habit of making and executing such contracts, are, it has been said, almost indispensable.⁷

22 Pac. 1136; *Ellis v. Crawford*, California Midway Oil Co., 178 Cal. 39 Cal. 523; *Luckhart v. Ogden*, 337, 177 Pac. 849.
30 Cal. 547.

1. *California Well Drilling Co. v. California Midway Oil Co.*, 178 Cal. 337, 177 Pac. 849.
4. *Slama Tire Protector Co. v. Ritchie*, 31 Cal. App. 555, 161 Pac. 25.

2. *Aguirre v. Alexander*, 58 Cal. 21; *Todd v. Lyon*, 36 Cal. App. Dec. 617; *O'Connor v. West Sacramento Co.*, 35 Cal. App. Dec. 857; *Brett v. Vanomar Producers*, 31 Cal. App. Dec. 33, 187 Pac. 758.
5. *Ellis v. Crawford*, 39 Cal. 526.
6. *California Well Drilling Co. v. California Midway Oil Co.*, 178 Cal. 337, 177 Pac. 849; *Holloway v. McNear*, 81 Cal. 154, 22 Pac. 514.
7. *Reynolds v. Jourdan*, 6 Cal. 108. As to expert and opinion evidence, see EVIDENCE.

3. *California Well Drilling Co. v.*

Subject Matter.

§ 194. In General.—Although the fundamental rules for the interpretation of contracts apply to agreements of all kinds,⁸ yet there are rules of interpretation, of common law or statutory origin, peculiar to contracts involving certain subject matter, which must be observed. The Civil Code provides that

“Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this article.”⁹

A contract of guaranty “is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.”¹⁰ Section 2778 of the Civil Code lays down certain rules which are to be applied in the interpretation of a contract of indemnity “unless a contrary intention appears.”¹¹

The rule that one who undertakes to accomplish a certain result impliedly agrees to do everything necessary to such accomplishment is applicable to contracts for the performance of services. Whatever is necessary to be done in order to accomplish work specially contracted to be performed is part of the contract, though not specified. With respect to the skill required of a person who is to render services, the test of efficiency is that degree of skill, efficiency and knowledge which is ordinarily possessed by those in the particular trade or business for which he is employed. Where the contract provides for no degree of skill higher than this, none can be required.¹² A contract to devote one’s “whole time” to the manage-

8. See *supra*, § 161.

9. Civ. Code, § 1066. As to rules of construction peculiar to grants, see *DEEDS; PUBLIC LANDS*.

10. Civ. Code, § 2806. See *GUARANTY*.

11. See *SURETYSHIP*.

12. 6 Ruling Case Law, pp. 863, 864. See *AGENCY*, vol. 1, p. 805; *ARCHITECTS*, vol. 3, p. 101; *MASTER AND SERVANT; WORK AND LABOR*.

ment of a business, it has been held, is not violated by occasional absence not resulting in defective management or loss of any kind.¹³

§ 195. Liability Under Building and Construction Contracts.—Where the necessary effect of a contract is to produce a result complained of by a third person, a property owner cannot maintain that the act is that of contractor. This would apply if the specifications for the work must render it inherently defective.¹⁴ Likewise, where, in the erection of a building, the owner agrees to pay a certain sum for doing a certain part of the work and specifically provides the kind of materials to be used and the manner in which they are to be used, and stands by and directs and afterwards approves the work, the risk of its serving the purpose intended is clearly upon the owner.¹⁵ Of course, it is immaterial who furnishes the specifications when the contractor has guaranteed certain results.¹⁶ And if an injury to property was caused by the contractor while doing the work which, it must be assumed, could have been done without causing it, and the contractor had agreed so to do it, it must be held that the injury was done in violation of his contract.¹⁷

A provision in a building contract that "the contractor shall do all that is necessary to protect the adjoining buildings, streets and the public during the excavation, doing all shoring, and bracing, and trenching" required

13. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

14. *Aston v. Nolan*, 63 Cal. 269, citing *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345. See INDEPENDENT CONTRACTORS; MASTER AND SERVANT; NEGLIGENCE.

15. *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983 (holding contractor did not impliedly warrant completed work would be of particular color);

Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 Pac. 496; *Roebbling Const. Co. v. Doe Estate Co.*, 33 Cal. App. 397, 185 Pac. 547 (holding contractor entitled to recover notwithstanding cracking of cement flooring).

16. *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.

17. *Aston v. Nolan*, 63 Cal. 269.

to that end, does not place upon the contractor the duty of going upon adjacent property and putting supports beneath the foundations of buildings thereon, nor impose upon him any greater liability than that imposed on the owner by section 832 of the Civil Code. That section as interpreted by the decisions of this court does not require support for buildings which have been superimposed upon the land adjacent to that upon which an excavation is to be made. Likewise, under a clause in a contract requiring the contractor to assume all responsibility for damages which may occur to the building or to any adjoining building by any act or omission of himself or his employees, the contractor is not liable for the cost of underpinning the walls of a building on adjoining property. It is usual to include such a paragraph in such agreements merely to protect the owner from the results of carelessness in the prosecution of the work. Nor is the contractor made liable for the cost of such work by a clause in the contract requiring him to furnish any necessary thing which may have been omitted from the specifications, nor by a clause whereby he is to furnish all requisite materials for the contract price. If the authorized agent of the owner of the building orders the contractor, while constructing the building, to underpin the walls of the building on adjacent property, an implied promise to pay the reasonable value thereof arises.¹⁸

It is to be noted that in the absence of a contract, express or implied, establishing a privity between an owner, and laborers or materialmen, the owner is not personally liable for services or materials furnished by them at the instance of the contractor.¹⁹

18. *Alta Planing Mill Co. v. Garland*, 167 Cal. 179, 138 Pac. 738, per *Melvin, J.* See, as to lateral and subjacent support, *ADJOINING LAND OWNERS*, vol. 1, p. 409 et seq.

19. *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640; *Bowen v. Aubrey*,

22 Cal. 566; *Mott v. Wright*, 43 Cal. App. 21, 184 Pac. 517; *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 521, 97 Pac. 414, 420. See *Loma Prieta Lumber Co. v. Hinton*, 12 Cal. App. 766, 108 Pac. 528 (holding finding that mill work fur-

§ 196. **Contractor's Bond.**—The provision of a building contractor's bond that any suit brought thereon to recover any claims thereunder must be instituted within the time allowed by law for instituting a suit to enforce a lien claim does not require the owner to bring his suit on the bond on account of the contractor's default, within such time, since the owner could not know the extent of his detriment until after the expiration of the time for the commencement of actions by lien claimants.²⁰ And when a bond given by a contractor expressly provides for the payment of attorneys' fees in the event of a breach of the conditions of said bond, and the record shows that the bond was signed, not only by a surety company, but also by the contractor, with the necessary consequence that he as well as his bondsmen would be liable upon the bond, it is proper for the court to make an award of attorneys' fees on a cross-complaint of the owner in an action by the contractor to recover the value of labor and materials furnished.¹ The terms of a bond and contract for the delivery of a building to the owner free from liens, claims and demands are to be construed as limited to such liens as are enforceable against the building, and not to include any unauthorized or invalid or excessive liens or claims.²

§ 197. **Contracts for Support.**—By the modern trend of authority, contracts to transfer property in consideration of care and support for life are placed in a class by themselves and are enforced without reference to the form or phraseology of the writing by which they are expressed.³ Contracts for support made by and in favor

nished toward erection of building was not supplied at request of owner was against evidence). See *MECHANICS' LIENS*.

20. *Gintjee v. Knieling*, 35 Cal. App. 563, 170 Pac. 641.

1. *Sinnott v. Schumacher*, 30 Cal. App. Dec. 897, 187 Pac. 105.

2. *Alcatraz etc. Assn. v. United States Fidelity etc. Co.*, 3 Cal. App. 338.

3. *Cole v. Mugridge*, 36 Cal. App. 179, 171 Pac. 827 (holding correspondence constituted contract).

of persons of declining years with children or relatives, upon adequate consideration, receive a liberal construction in favor of the obligees, and are to be understood as entitling the beneficiary to be comfortably situated as well as to be supplied with adequate food, clothing and other necessities. The person to be supported should be allowed reasonable liberty in the choice of situation and surroundings, and not compelled to remain under the roof and within the control of the parties whose pecuniary interest it is to be relieved of the burden at the earliest moment.⁴⁻⁵ In an action for breach of an alleged oral contract by the defendant to support the plaintiff for life, in consideration of the rendering of certain personal services, where there is a blood relationship between the parties, it may well be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services.⁶

§ 198. Transfer of Property.—The decisions involving the construction of contracts relating to the transfer of property are considered elsewhere.⁷ Here are noticed only certain decisions not clearly pertaining to other titles.

4-5. 6 Ruling Case Law, p. 872.

A contract whereby a son agreed to pay to his father a monthly sum during the period of the life of his father, and further to pay said sum to two named sisters "or to their order, during the period they remain single or unmarried, and said payment is to cease as soon as both are married, but the payment as aforesaid is only to be made to said Rose and Esther [the sisters] in case the said Rose and Esther are unmarried after the death" of the father, should be construed as requiring the payment to be made to a sister who was unmarried at the father's death, so long as she continued unmarried.

although the other sister, prior to the death of the father, became and ever since has been a married woman; *Cohen v. Cohen*, 141 Cal. 534, 75 Pac. 100.

See, also, *Weeks v. Link*, 137 Cal. 502, 70 Pac. 548 (holding contract entitled grantors to undisputed use and occupation of premises conveyed to son-in-law, regardless of whether it gave them a life estate therein); *Mann v. Mann*, 14 Cal. 326, 74 Pac. 995 (construing contract as grant to son of freehold estate for life of mother).

6. *Gopcevic v. Gopcevic*, 39 Cal. App. 306, 178 Pac. 734.

7. See *ASSIGNMENTS*, vol. 2, p. 230; *BAILMENTS*, vol. 4, p. 1; *CHATTEL*

A plain and unequivocal promise to convey land to a person if he will go upon and improve it is a promise to give the property absolutely, and to execute a deed therefor.⁸ But a contract by the terms of which one person is to advance to another a certain sum of money for the purpose of buying the interests of the owners, other than the latter, in a tract of land, which interests the latter is to purchase and hold, together with his own interest, for the joint benefit of himself and the other contracting party, and to repay the latter out of the first proceeds of any sale the amount advanced, the remainder to belong to them in equal shares, is not a contract for the conveyance of an estate in real property.⁹ An assignee of a contract for the sale of real estate, who turns it over to others without formal assignment, so that they receive the benefit of the purchase,—especially if he participates therein himself,—is liable upon a covenant to pay his assignor a certain sum in case he sells such contract or completes the purchase.¹⁰ Construing a contract which, after providing for the manufacture by the defendants of certain timber into lumber, gave the plaintiffs a right to buy, at a stipulated price, “any part or the whole of the refuse lumber that might accumulate by manufacturing said timber into lumber,” the court held that the quoted words referred to quantity and not quality, and that they authorized the plaintiffs to take the whole or any fractional part of the refuse, but required that it be taken as a whole, and not culled and picked over for the best pieces.¹¹

MORTGAGES, vol. 5, p. 37; DEEDS;
LANDLORD AND TENANT; MORTGAGES;
SALES; VENDOR AND PURCHASER.

8. *Burlingame v. Rowland*, 77 Cal. 315, 1 L. R. A. 820, 19 Pac. 526.

9. *House v. Piercy*, 181 Cal. 247, 188 Pac. 807 (holding section 3306 of the Civil Code, which prescribes

the measure of damages recoverable for breach of contract to convey an estate in real property, not applicable).

10. *Ferguson v. McBean*, 91 Cal. 63, 14 L. R. A. 65, 27 Pac. 518. See VENDOR AND PURCHASER.

11. *Waterman v. Morrell*, 66 Cal. 217, 9 Pac. 71.

§ 199. Contract in Restraint of Trade.—It is often said that contracts in restraint of trade should be strictly construed; that they are against public policy, and therefore presumably bad; and that their provisions should not be extended by construction so as to favor persons desiring to enforce them beyond what their terms clearly require. Perhaps the modern rule is that such contracts should be construed without any adverse bias.¹² However, the rule of liberal construction to be given to the code provisions as to contracts accompanying sales of goodwill is in aid of agreements falling within the permitted exceptions of the code as to contracts in restraint of trade, and does not apply to cases not falling within those exceptions.¹³ An inhibition of agency in a contract not to establish, carry on, conduct or maintain a rival business, or act as agent therefor, for a period of three years, and a decree enforcing such contract according to its terms, are to be construed as prohibiting only an agency wholly or partially for the conduct of the business, and not as prohibiting employment as a mere servant or clerk, though such employment may fall within the more enlarged meaning of agency as a general term.¹⁴

§ 200. Agreement to Pay Sum of Money in Specific Articles.—There is some diversity of opinion in the various jurisdictions as to how agreements to pay a sum of money in specific articles at a fixed rate shall be construed in case of failure to furnish the articles within the time specified. One line of authorities holds that such contracts are agreements for the delivery of specific property. The weight of authority, however, is in favor of the doc-

12. *Graca v. Rodrigues*, 33 Cal. App. 296, 185 Pac. 1012 (citing *Herriman v. Menzies*, 115 Cal. 16, 56 Am St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730). See supra, §§ 92-104, as to contracts in restraint of trade generally.

13. *Merchants' Ad-Sign Co. v.*

Sterling, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468. See supra, § 92 et seq., as to contracts in restraint of trade generally.

14. *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 668.

trine that upon the failure of the payer to deliver the articles within the time provided, the contract becomes an obligation to pay the sum of money mentioned and may be sued on as such.¹⁵ This doctrine has been adopted in California.¹⁶ Thus an agreement to pay "the sum of fifty thousand dollars in bonds" for the conveyance of certain rights is not a mere agreement to sell or deliver bonds, but is a promise to pay money, and the promisee, after a default of the promisor, may sue thereon as upon a money obligation and recover without alleging or proving the value of the bonds.¹⁷

Parties.

§ 201. **Designation of Parties.**—A person who is not named in or bound by the terms of a written contract cannot be rendered liable on it by parol evidence of an intention that he should be bound. This rule is particularly applicable where the person was known to, and in direct communication with, the obligee, when the contract was executed. Accordingly, an assignor of a contract for the purchase of land, who, when making the assignment, knows that another is to be equally interested with the assignee in the contract and does not have his name inserted in the assignment, cannot thereafter recover from him upon a covenant contained in such assignment on the part of the assignee.¹⁸ But third persons may show that

15. *Beckwith v. Sheldon*, 168 Cal. 742, Ann. Cas. 1916A, 963, 145 Pac. 97 (quoting from note by Freeman to *Roberts v. Beatty*, 2 Penr. & W. (Pa.) 63, 21 Am. Dec. 425). As to the discharge of debts by payment, see PAYMENT.

16. *Beckwith v. Sheldon*, 168 Cal. 742, Ann. Cas. 1916A, 962, 145 Pac. 97 (citing *Cummings v. Dudley*, 60 Cal. 383, 44 Am. Rep. 58; *Marshall v. Ferguson*, 23 Cal. 65); *Kalkmann v. Baylis*, 17 Cal. 291 (election to

pay in freight on lumber or in money). And see *Etienne v. Etienne*, 42 Cal. App. 441, 183 Pac. 689 (holding that proper construction of contract involved brought it within above rule).

17. *Beckwith v. Sheldon*, 168 Cal. 742, Ann. Cas. 1916A, 963, 145 Pac. 97.

18. *Ferguson v. McBean*, 91 Cal. 63, 14 L. R. A. 65, 27 Pac. 518. And see *Palmer v. Lavigne*, 104 Cal. 30, 37 Pac. 775 (holding that mere

the respective parties are interested in the subject matter thereof in a different manner, capacity or extent than is indicated by the face of the contract, and may prove who are the real principals in the transactions to which it relates, and their respective liabilities. Were this not the rule, it might be impossible to reach a secret partner or an undisclosed principal.¹⁹ When a contract describes one party as a corporation, no further proof on that point is necessary.²⁰ However, where a corporation is formed by certain parties as a mere agency for more conveniently carrying on their agreements, the relation sustained by it to them is substantially, if not technically, that of a trustee; and, when substantial justice can be administered only by treating the parties in the light of the agreements between themselves, independently of their incorporation, they will be so treated.¹ It is elementary that a bond given to guarantee the execution of a contract according to its terms becomes a part of such contract, and to that contract the sureties become parties the same as though they had actually executed the contract itself.²

acquiescence by husband in work done by third person under contract with wife did not make him party thereto).

19. *Ellis v. Crawford*, 39 Cal. 523. See AGENCY, vol. 1, p. 854.

20. *Tustin Fruit Assn. v. Earl Fruit Co.*, 6 Cal. Unrep. 37, 53 Pac. 693 (citing *Fresno Canal & Irr. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37). See CORPORATIONS.

1. *Hunt v. Davis*, 135 Cal. 31, 66 Pac. 957; *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509; *Kohl v. Lillienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *Cornell v. Corbin*, 64 Cal. 197, 30 Pac. 629; *Shorb v. Beaudry*, 56 Cal. 446; *Chater v. San Francisco etc. Co.*, 19 Cal. 219, 247. See CORPORATIONS.

2. *W. P. Fuller & Co. v. Alturas*

S. Dist., 28 Cal. App. 609, 153 Pac. 743. See SURETYSHIP.

An undertaking given to secure the faithful performance of a contract for the construction of a school building which guarantees that the contractor "shall, in all things, stand true and abide by and well and truly keep and perform the covenants, conditions and agreements in that certain contract . . . and shall in all respects fully carry out and perform his part of said contract, as herein stipulated," is not an undertaking given for the sole benefit of the school district, but is for the benefit, as well, of materialmen, mechanics and laborers furnishing materials and bestowing labor upon the building, where the contract provides

§ 202. **Contracts in Representative Capacity.**—Where a person executes a writing in his individual capacity and recites in the body of the instrument that he acts as the representative of a third person, it cannot be said as a matter of law that by so doing he binds the third person, and with much less reason can it be said that he does not bind himself. At most, it becomes a question of fact which may be determined by parol evidence.³ Where a reading of a simple contract, however inartificially, drawn, discloses that it is executed for or on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the agent. This, as it has been pointed out, is not contradicting by parol the terms of a written instrument, for, "It is no contradiction of a contract, which is silent as to the fact, to prove that a party is acting therein not on his own behalf, but for another."⁴

Where a contract between a laundry company and the owner of a driver's route requires the driver to make all collections for laundry intrusted to him, and to guarantee all accounts, there is no privity between the company and those who intrust their laundry to the driver, and the liability for payment for such work to the company is on the driver. The fact that under the terms of the contract the driver, besides a fixed payment, is also entitled to a specified percentage on the gross amount collected does not affect the interpretation of the contract

that the contractor will provide the materials and the labor essential to the construction of the building, "at his own cost and expense." *W. P. Fuller & Co. v. Alturas S. Dist.*, 28 Cal. App. 609, 153 Pac. 743.

3. *Benedict v. Wilson*, 10 Cal. App. 719, 103 Pac. 360.

4. *Curran v. Holland*, 141 Cal. 437, 75 Pac. 46; *Southern Pacific Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650. See *AGENCY*, vol. 1, p. 131 et seq; for general discussion of the rules pertaining to undisclosed agency.

as to his liability to the company for payment for the laundry work intrusted to him.⁵

§ 203. Relation between Parties.—Where the terms of a contract are clear and certain, its meaning and effect and the relation of the parties to it become questions of law to be decided by the court.⁶ The intention of the parties governs,⁷ and the contract as a whole should be examined in arriving at a determination of the relation existing between them.⁸ The relation ordinarily created by a contract is that of promisor and promisee, obligor and obligee, or debtor and creditor. If a relation of trust is created, and in view of it, a confidence is reposed, a fiduciary relation may be said to exist.⁹ It is true, of course, that many contracts embrace a trust relationship, but it does not follow that in all an express trust is created.¹⁰ An agreement between conflicting claimants for a patent to lands that an action pending to determine the right to the lands should be dismissed and that one party should proceed to obtain the patent, and that, when obtained, a conveyance should be made to the other party of a portion of the lands, does not create an express trust

5. *Puritas Laundry Co. v. Green*, 15 Cal. App. 654, 115 Pac. 660.

6. *Green v. Soule*, 145 Cal. 96, 78 Pac. 337; *Mickel v. Althouse*, 38 Cal. App. 321, 176 Pac. 51. See *Boehm v. Spreckels*, 183 Cal. 246, 191 Pac. 5, where the court concluded that a contract transferring a newspaper route created an agency and did not declare a sale of property, and disapproved of the opinion of the district court of appeal in *Otten v. Spreckels*, 24 Cal. App. 262, 141 Pac. 224, so far as it contains anything inconsistent with this conclusion. See *supra*, § 193, as to relative functions of court and jury in the construction of contracts.

7. *Smith v. Blodget*, 62 Cal. Dec. 545, 201 Pac. 584 (agreement permitting a person "to sell" land on certain terms). See *supra*, § 163. See *AGENCY*, vol. 1, p. 694; *PARTNERSHIP*.

8. *Bessing v. Prince*, 34 Cal. App. Dec. 960, 198 Pac. 422 (construing contract as one of sale instead of agency, as designated by the instrument itself). And see *C. W. Clarke Co. v. Walker*, 36 Cal. App. Dec. 489 (defendant held to have dealt as principal and not as agent). See *supra*, § 165.

9. 6 *Ruling Case Law*, 877. See *TRUSTS*.

10. *Grotefend v. May*, 33 Cal. App. 321, 165 Pac. 27. See *TRUSTS*.

but is in effect merely a contract for the conveyance of land.¹¹ When a stranger to a joint written contract, entered into by several persons, relies on it as evidence of a partnership, in reference to work which the parties undertook to perform, such parties may show, by parol evidence, the true relations between themselves, even though such evidence vary or contradict its terms.¹² It has been declared that the fact that an employer has the right to make alterations in, deviations from, additions to and omissions from contract work does not change the relation of one contracting to do the work from that of an independent contractor to that of a mere servant.¹³

§ 204. Joint and Several Contracts.—Section 1430 of the Civil Code provides:

“An obligation imposed upon several persons, or a right created in favor of several persons, may be: 1. Joint; 2. Several; or 3. Joint and several.”

And section 1431 reads:

“An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.”¹⁴

11. *Grotefend v. May*, 33 Cal. App. 321, 165 Pac. 27.

12. *Smith v. Moynihan*, 44 Cal. 53 (holding relation of partners did not exist). See PARTNERSHIP.

13. *Green v. Soule*, 145 Cal. 96, 78 Pac. 337; *Nickel v. Althouse*, 38 Cal. App. 321, 176 Pac. 51. See INDEPENDENT CONTRACTORS.

14. *Jameson v. Chanslor-Canfield M. Oil Co.*, 176 Cal. 1, 167 Pac. 369 (lease of oil lands); *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26 (sale of land); *Farmers' Exchange Bank*

v. Morse, 129 Cal. 239, 61 Pac. 1088 (promissory note); *Colquhoun v. Pack*, 32 Cal. App. 97, 161 Pac. 1168 (sale of goods); *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379 (contract by heirs apparent to pool and equally divide bequests); *Pettit v. Forsyth*, 15 Cal. App. 149, 113 Pac. 892 (holding presumption overcome by words of contract). See PARTIES for discussion of question of parties to actions upon joint and joint and several obligations.

In conformity with these sections the rule is that several persons contracting together with the same party for one and the same act shall be regarded as jointly and not as individually or separately liable, in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promisors.¹⁵ Especially is this the rule as to the legal liability of partners upon their partnership obligations.¹⁶ The latter code provision quoted above has reference, however, merely to the relation between the parties in whose favor the right is created, and the party against whom it is created. It is correlative to the obligation incurred by the party against whom the right exists, but does not purport to determine the interest of the parties in whose favor the right exists as between themselves.¹⁷

The "special cases" mentioned in section 1431 of the Civil Code are found in sections 1659 and 1660 of the same code. Section 1659 provides:

"Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."¹⁸

15. *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Miner v. Rickey*, 5 Cal. App. 451, 90 Pac. 718. See, also, note, 5 *California Law Review*, 163, discussing this proposition.

16. Civ. Code, § 2442; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Freeman v. Campbell*, 55 Cal. 197; *Miner v. Rickey*, 5 Cal. App. 451, 90 Pac. 718. See PARTNERSHIP.

17. *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 59 Pac. 389.

18. *Hurlbut v. Quigley*, 180 Cal. 265, 180 Pac. 613 (agreement written on back of note); *Bell v. Adams*, 150 Cal. 772, 90 Pac. 118 (contract of employment); *Gumrer v. Mairs*, 140 Cal. 535, 74 Pac. 26 (sale of land); *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088 (promissory note); *Brooke v. Glide*, 39 Cal. App. 534, 179 Pac. 546 (contract executed by one partner without authority); *Shelton v. Michael*, 31 Cal. App. 328, 160 Pac. 578 (contract for construction of road); *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260 (sale of goods).

And section 1660 is as follows:

"A promise, made in the singular number, but executed by several persons, is presumed to be joint and several."¹⁹

Section 1659 was intended, it has been remarked, to accomplish just what it says. Where all the makers of a note, for example, received some benefit from the consideration, and the fact is made in some way to appear, the law raises the presumption that the promise is joint and several.²⁰ But this section cannot be construed to mean that the parties, though receiving some benefit from the consideration, may not create a joint liability; section 1430 of the Civil Code expressly says they may create such a liability.¹ Where it clearly appears that it was not the intention of the parties to create a joint and several liability, and it clearly appears, on the contrary, that the intention was that the promise should be joint, the presumption is overcome, and the promise must be enforced according to its express terms.² But in the absence of evidence showing a contrary intention, the presumption stated in section 1659 must control.³ An agreement by a number of persons which states that the undersigned "will pay the sum annexed to their names," in order to make up an aggregate sum to be paid to another party, in consideration of services to be rendered, creates a several and not a joint obligation.⁴

19. *Hurlbut v. Quigley*, 180 Cal. 265, 180 Pac. 613; *Farmers' Exch. Bk. v. Altura etc. Co.*, 129 Cal. 263, 61 Pac. 1077.

20. *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26; *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088. See NEGOTIABLE INSTRUMENTS.

1. *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088.

2. *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26; *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088; *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130.

3. *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26.

4. *Moss v. Wilson*, 40 Cal. 159. See SUBSCRIPTIONS.

Time and Place.

§ 205. **Time in General.**—The general rule that the intention of the parties as derived from the language used is to control in the construction of a contract,⁵ applies to time of performance as well as to all other matters. When the time of performance is expressed in unambiguous terms, the court will not presume that some other time was intended.⁶ A provision that a party may, at the end of ninety days after an event, employ powers which, except for the provision, he could employ immediately after the happening of the event, means that he shall not employ them during the ninety days.⁷ Ordinarily a provision in a building contract specifying a definite time within which the structure shall be completed is to be construed as meaning that it shall be by the end of such time in such condition as to be ready for occupancy, and not to include a sidewalk to be constructed in connection with the building.⁸ Where an agreement provided that labor in a mine was to be paid for when the mine was sold, or a sufficient sum was realized from it to pay the plaintiff, it was held that the sum became due when an agreement to sell was made, and more than sufficient to pay plaintiff was paid on account.⁹ An agreement by a partner purchasing the interest of his associate to pay an additional sum providing the profits of the business justified him in so doing, the matter to be decided in three years, does not obligate him to carry on the business for any particular time.¹⁰

If the time of performance is not fixed by any express provision, it is to be determined by the provisions of the

5. See *supra*, § 163.

6. *Pierce v. Merrill*, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64; *Reed v. Sefton*, 11 Cal. App. 88, 103 Pac. 1095.

7. *Weil v. Jones*, 53 Cal. 46.

8. *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371.

9. *Eaton v. Richeri*, 83 Cal. 185, 23 Pac. 286. See *PAYMENT* for general discussion of principles controlling time of payment of obligations.

10. *Huntington v. Russell et al.*, 2 Cal. Unrep. 558, 8 Pac. 511.

Civil Code, such provisions being deemed to be part of the contract.¹¹ So the failure of a contract of sale to show when and where delivery is to be made will not, in law, render the contract a mere memorandum.¹² It has been held that an oral agreement of parties as to the time for the performance of a contract is admissible in evidence.¹³ But, it is declared, "where the law fixes the time of performance, parol evidence of some other definite time is inadmissible as varying the written instrument."¹⁴

§ 206. Contract Calling for Performance on Holiday.—
The codes provide:

"Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed."¹⁵

This section is not mandatory, but is permissive as to an act appointed by "law or contract." The extent and purpose of the provision are quite apparent. It is to protect, relieve or save one party from a forfeiture or deprivation of a right by the other party on account of noncompliance with the terms of a contract when noncompliance might be impracticable or impossible by reason of the required date of performance falling on a holiday. In speaking of an act to be performed by "con-

11. *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964. And see *supra*, § 186.

12. *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964.

13. Code Civ. Proc., § 1856; *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39; *Wolters v. King*, 119 Cal. 172, 51 Pac. 35; *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571.

14. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103

Pac. 938 (parol evidence held inadmissible to vary terms of written option so that one year should be allowed within which to accept same in writing).

15. Civ. Code, § 11; Code Civ. Proc., § 13; Pol. Code, § 13; *Northey v. Bankers' Life Assn.*, 110 Cal. 547, 42 Pac. 1079 (construing insurance policy); *Bidegaray v. Ormaca*, 32 Cal. App. Dec. 941, 192 Pac. 176 (sale of livestock). See NEGOTIABLE INSTRUMENTS.

tract" the section means contracts such as are defined by sections 1549 and 1550 of the Civil Code, consisting of actual contracts entered into between all the parties,—contracts which are definitely such, and by the terms of which conditions or provisions are to be complied with by the parties within a specified time, with a possible forfeiture of rights thereunder for noncompliance.¹⁶

§ 207. Time not Specified—Reasonable Time Implied.—

Under section 1657 of the Civil Code, when no time is specified for the performance of a contract, if the act to be performed "is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained."¹⁷ As a general rule, however, under this section, "if no time is specified for the performance of an act required to be performed, a reasonable time is allowed." The law implies that the contract shall be performed within a reasonable time,¹⁸ or at least that reasonable efforts to perform

16. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92, per Lorigan, J. (holding that a by-law of a corporation fixing the time for the monthly meeting of the directors is not a "law or contract" within the meaning of section 11 of the Civil Code).

17. *Price v. Smith Mfg. Co.*, 35 Cal. App. Dec. 490, 200 Pac. 53; *Clairmonte v. Napier Motor Co.*, 11 Cal. App. 265, 104 Pac. 712; *Whittier v. Gormley*, 8 Cal. App. 489, 86 Pac. 726; *Peters v. George*, 1 Cal. App. 239, 81 Pac. 1117; *Rounthwaite v. Rounthwaite*, 6 Cal. Unrep. 878, 68 Pac. 304. See PAYMENT.

18. *Brookings L. & B. Co. v. Manufacturers' Co.*, 173 Cal. 679, 161 Pac. 266 (contract for installation of automatic fire-extinguishers); *Pierce v. Avakian*, 167 Cal.

330, 139 Pac. 799 (agreement to forbear suit); *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919 (sale of citrus trees to be budded to certain varieties by seller); *Salinas Valley Lumber Co. v. Magnesilica Co.*, 159 Cal. 182, 112 Pac. 1089 (delay in delivery of lumber due to confusion of transportation facilities following earthquake held reasonable); *Schwartz v. Carpenter*, 157 Cal. 432, 108 Pac. 318 (lease of land, lessor to make improvements); *Nason v. Lingle*, 143 Cal. 363, 77 Pac. 71 (void contract by husband to exchange real property of wife for other land); *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39 (contract to deliver water); *Greenberg v. California Bituminous Rock Co.*, 107 Cal. 667, 40 Pac. 1053 (quot-

within such time will be made,¹⁹ and will not permit this implication to be rebutted by extrinsic testimony going to fix a definite term, because this varies the contract.²⁰ Reasonable diligence and good faith must be required in such instances, and it is the duty of the court to hear evidence and therefrom fix a time which would be fair.¹ The testimony of a superintendent of construction as to the preliminary work and assembling of materials necessary to make the installation of fire-extinguishers has been held proper as tending to establish

ing from *Parsons on Contracts*); *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280 (sale of land); *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 271 (sale of land); *Williston v. Perkins*, 51 Cal. 554 (contract by builder of vessel to pay for work on same when it was sold); *Miller v. Lerdo Land Co.*, 32 Cal. App. Dec. 746 (trust for holding and selling of real property); *Charles Boldt Co. v. Julius Levin Co.*, 41 Cal. App. 661, 183 Pac. 200; *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371 (building contract); *Roughton v. Brookings Lumber & Box Co.*, 26 Cal. App. 752, 148 Pac. 539 (contract to install fire-extinguishers); *Martin v. Western Pac. Ry. Co.*, 21 Cal. App. 589, 132 Pac. 602 (sale of goods); *Albion Lumber Co. v. Lowell*, 20 Cal. App. 782, 130 Pac. 858, 864 (holding delay in performance of contract for purchase of redwood ties not unreasonable); *Spaeth v. Ocean Park etc. Inv. Co.*, 16 Cal. App. 329, 116 Pac. 980 (option to rescind sale of mining stock); *Pinkiert v. Kornblum*, 5 Cal. App. 522, 90 Pac. 968 (agreement, in consideration of payment of money, to issue, or cause to be issued, shares of stock).

19. *Campbell v. Kennedy*, 177 Cal. 430, 170 Pac. 1107; *Lynch v. Keystone Con. Min. Co.*, 163 Cal. 690, 126 Pac. 968. In this case, which concerns an agreement to pay money in event that the amount should become available from certain specified sources, the court distinguishes *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 88 Pac. 920, on the ground that while the contract there called for payment of a valid indebtedness only from the proceeds of the sale by a land company of certain lots, the land company expressly agreed to use reasonable diligence in placing its lands upon the market and making such sales, and the trial court found that it had failed to use such diligence. See *Globe Mfg. Co. v. Harvey*, 61 Cal. Dec. 338, 196 Pac. 261 (holding facts were sufficient to show that there was no unreasonable delay on the part of defendant in proceeding under the contract).

20. *Greenberg v. California Bituminous Rock Co.*, 107 Cal. 667, 40 Pac. 1053.

1. *Gazos Creek Mill etc. Co. v. Coburn*, 8 Cal. App. 150, 96 Pac. 359. See *infra*, § 208.

what constituted a reasonable time within which to perform the same.³ But it has been declared that the exclusion of testimony by an owner's agent as to what would constitute a reasonable time to complete a building was not erroneous, the determination of the question being "wholly a prerogative of the court."³

§ 208. Reasonable Time—Question of Law or Fact.—Ordinarily, it is a matter of no difficulty to ascertain whether a particular question be one of law or of fact. But in the class of cases involving questions of reasonable time, reasonable care, due diligence and the like, it often happens that some general conclusion is to be drawn from a variety of facts and circumstances appertaining to the particular case.⁴ There is authority for the proposition that when a contract is to be performed within a reasonable time, the question is one of law.⁵ On the other hand, it has been stated that the question is one of fact.⁶ In an early case the court disposed of the matter in the following language:

"The term reasonable time is a technical and legal expression, which in the abstract involves matter of law as well as matter of fact. Whenever any rule or principle of law applies to the special facts proved in evidence and determines their legal quality, its application is mat-

2. *Roughton v. Brookings Lumber & Box Co.*, 26 Cal. App. 752, 148 Pac. 539. In such a case, however, where the contract did not specifically provide any time within which performance should be completed, but did provide that no modifications of the written proposal to do the work, other than in writing by the president, should be binding upon the contractor, oral evidence is inadmissible to show that at the time of entering into the written contract, it was orally agreed by an employee of the contractor that the latter would

complete the installation within a certain time from the date thereof.

3. *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371.

4. *Luckhart v. Ogden*, 30 Cal. 547.

5. *Greenberg v. California Bituminous Rock Co.*, 107 Cal. 667, 40 Pac. 1053; *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371.

6. *Hoppin v. Munsey*, 61 Cal. Dec. 602, 198 Pac. 398; *Cambridge v. Ramser*, 30 Cal. App. Dec. 288, 185 Pac. 862; *Quill v. Jacoby*, 4 Cal. Unrep. 736, 37 Pac. 524.

ter of law. But whenever the special facts and circumstances are such that the court cannot by the aid of any legal rule or principle decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. Where the law itself prescribes what shall be considered to be reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts. Where, on the other hand, the law does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts or *res gestae*, it is for the jury to draw the general inference of reasonable or unreasonable in point of fact."⁷

It is clear that what is a reasonable time must be determined from all the circumstances of the individual case,⁸ for reasonable time connected with one set of circumstances, might be quite unreasonable, connected with other circumstances.⁹ In the absence of any showing that the delay in performance was so unreasonable as to render the contract oppressive, or injurious to the other party, an implied finding by the jury that the time was reasonable should not be disturbed.¹⁰ And a finding by a trial court, based on conflicting testimony, that certain delays incident to doing work were reasonable, will not be disturbed on appeal.¹¹

§ 209. Reasonable Time in Particular Cases.—Where a contract for the purchase of grapes provides that on the

7. *Luckhart v. Ogden*, 30 Cal. 547, per Currey, C. J.

8. *Hoppin v. Munsey*, 61 Cal. Dec. 602, 198 Pac. 398; *Cambridge v. Ramser*, 30 Cal. App. Dec. 288, 195 Pac. 862; *Clovis Fruit Co. v. California Wine Assn.*, 40 Cal. App. 623, 181 Pac. 229; *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371; *Martyn v. Western Pacific Ry. Co.*, 21 Cal. App. 589, 132 Pac. 602 (hold-

ing no unusual delay in executing order for goods); *Quill v. Jacoby*, 4 Cal. Unrep. 736, 37 Pac. 524.

9. *Scherr v. Little*, 60 Cal. 614.

10. *Spaeth v. Ocean Park etc. Inv. Co.*, 16 Cal. App. 329, 116 Pac. 980.

11. *Brookings Lumber & Box Co. v. Manufacturers' etc. Co.*, 173 Cal. 679, 161 Pac. 266.

happening of a certain event the purchaser might, at its option, terminate the contract by giving notice to that effect, and thereafter such event happens, the purchaser exercises its option to cancel within a reasonable time where it gives the notice two and one-half months before the commencement of the vintage season, or seven months after the occurrence of the event giving rise to the right of cancellation, where such delay is not for any unfair purpose and the growers have suffered no prejudice because of such delay.¹² And in an action to recover a sum of money paid on the purchase price of a dwelling-house to be erected by the defendant, on the ground that its construction had not been completed within a reasonable time, no unreasonable delay is shown upon proof that the building was completed within seven days of the time set by the plaintiff for such completion. And the completion of the sidewalk around the house within five or six weeks after the completion of the cottage was within a fairly reasonable time after the cottage was finished.¹³ In the absence of any proof of damages to a grantee from failure of his grantor to complete a levee contracted for, a finding that it was completed within a reasonable time will not be disturbed, though the work was not completed for four years.¹⁴

It cannot be said as a matter of law that twenty days after date of a contract for the issuance of stock in a corporation in process of organization is a sufficient time in which to procure the issuance of the stock, and any facts showing the contrary or that the failure was caused by the promisor's act must be alleged.¹⁵ Under an agree-

12. *Clovis Fruit Co. v. California Wine Assn.*, 40 Cal. App. 623, 181 Pac. 229.

13. *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371. And see *Nelson v. Hoge*, 35 Cal. App. Dec. 735, 200 Pac. 734 (holding finding that building was completed within

a reasonable time was warranted, where only eleven days had elapsed after the time allowed by the original contract).

14. *Quill v. Jacoby et al.*, 4 Cal. Unrep. 796, 87 Pac. 624.

15. *Pinkiert v. Kornblum*, 5 Cal. App. 522, 90 Pac. 969.

ment to forbear suit upon a promissory note, the commencement of an action thirteen months after the note becomes due shows a reasonable extension.¹⁶ Likewise, when a lessee holds property subject to sale and agrees to give up possession after a sale is made, "provided the purchaser wants possession immediately," a notice by the purchaser given ten weeks after the execution of the sale is given within a reasonable time.¹⁷ But, it has been held, three years is an excessive delay for the payment of nine hundred dollars as the purchase price of land.¹⁸ And where the grantor in a deed covenants to convey certain lands, or other lands in lieu thereof upon reasonable notice, a delay of eight years in performance is unreasonable.¹⁹

§ 210. Extension of Time.—In an early case it was declared that the time for the performance of a simple contract in writing may be waived or extended by a subsequent oral agreement.²⁰ But, as is pointed out in the later decisions, that case was decided prior to the amendment of 1874 to section 1698 of the Civil Code, and the rule there laid down by the court is not the law at present.¹ Section 1698 of the Civil Code as amended provides:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement and not otherwise."²

16. *Pierce v. Avakian*, 167 Cal. 330, 139 Pac. 799 (holding delay of thirteen months under agreement to forbear to sue was reasonable time). -

17. *McVitty v. Flentge*, 30 Cal. App. Dec. 631, 186 Pac. 610.

18. *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 271.

19. *Vance v. Pena*, 41 Cal. 686.

20. *Waugenheim v. Graham*, 39 Cal. 169.

1. *Harloe v. Lambie*, 132 Cal. 136, 64 Pac. 88; *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938.

2. Prior to its amendment in 1874, section 1698 of the Civil Code provided: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement; and not otherwise, except as to the time of perform-

When an agreement for the enlargement of the time within which a contract was to be performed is silent as to the duration of the extension, the law implies that the extension will be for a reasonable time. And an agreement in general terms to enlarge the time for the performance of a contract which provides for several things to be done within a specified time, enlarges the time for the performance of all the acts in the contract.³ Clearly, then, where an agreement extending the time for performance expressly provides that the agreement is "subject to all the terms, covenants, and conditions" of the original contract of sale, such provision has the effect of carrying into the agreement all of the terms and conditions of the original contract, including a provision that time was of the essence, and no express declaration in such agreement to that effect is essential.⁴ It has been held that a memorandum extending the time for performance from the original ten days to another fixed date did not have the effect of terminating the contract at that time. It remained in effect until withdrawn in writing, as expressly provided in the contract; and the extension merely prevented the termination of it by notice in writing prior to the end of the extended time.⁵ Whether an agreement between parties amounts to an extension of time for the performance of a former contract between them, and if so, what time, are questions of law for the court and not of fact for a jury.⁶ The benefit of a suspension of performance inures to the promisor regardless of an assignment by the promisee.⁷

§ 211. Time as of Essence of Contract.—Time, in the abstract, is not essential. It is material so far only as,

ance, which may be extended by any form of agreement." See *infra*, §§ 225-228, as to modification of contracts generally.

3. *Luckhart v. Ogden*, 30 Cal. 547.

4. *Newhall Land & Farming Co.*

v. Burns, 31 Cal. App. 549, 161 Pac. 14, per Shaw, J.

5. *Clark v. Dalziel*, 3 Cal. App. 121, 84 Pac. 429.

6. *Luckhart v. Ogden*, 30 Cal. 547.

7. *Jackson v. Beers*, 14 Cal. 189.

when associated with other circumstances, it may produce injury or unjust consequences.⁸ By the civil law, a mere nonperformance within a stipulated time does not, ipso facto, annul a contract, unless, indeed, time is of the very essence of the contract.⁹ But at common law, time has always been considered of the essence of the contract.¹⁰ Equity, unwilling to permit a forfeiture if it can be avoided, has held otherwise, except when the parties have so expressed their intent, or it is clearly to be inferred.¹¹ Where time is expressly made of the essence of the contract, equity will not ignore the provision, for equity follows the law, and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into.¹² Neither at law nor in equity is a party excused from performing his contract within the time agreed, further than that in certain contracts failure to perform strictly according to contract, as to time, does not authorize the other party to rescind.¹³

The equitable rule where time is not of the essence is succinctly stated in section 1492 of the Civil Code,¹⁴ which provides that

8. Clovis Fruit Co. v. California Wine Assn., 40 Cal. App. 623, 181 Pac. 229. See SALES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

9. Holliday v. West, 6 Cal. 519.

10. Boone v. Templeman, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; Bennett v. Hyde, 92 Cal. 131, 28 Pac. 101.

11. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; Beverly v. Blackwood, 102 Cal. 83, 36 Pac. 378; Bennett v. Hyde, 92 Cal. 131, 28 Pac. 104; Steele v. Branch, 40 Cal. 3; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Brown v. Covillaud, 6 Cal. 566.

VI Cal. Jur.—23

12. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; Bennett v. Hyde, 92 Cal. 131, 28 Pac. 101; Newton v. Hull, 90 Cal. 487, 27 Pac. 429; Woodruff v. Semi-Tropic etc. Co., 87 Cal. 272, 25 Pac. 354; Vorwerk v. Nolte, 87 Cal. 236, 25 Pac. 412; Martin v. Morgan, 87 Cal. 203, 22 Am. St. Rep. 240, 26 Pac. 350; Grey v. Tubbs, 43 Cal. 359.

13. American Type etc. Co. v. Packer, 130 Cal. 459, 62 Pac. 744; Mettler v. Vance, 30 Cal. App. 499, 158 Pac. 1044.

14. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; Bennett v. Hyde, 92 Cal. 131, 28 Pac. 101; Thompson v. Newman,

"Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime."

Where time is of the essence, and a party agreeing to do an act within the time proposed is the only party in default, such party can take no advantage from his own wrong.¹⁵ It has been declared that a contract is wholly at an end when time is of the essence and both parties are in default.¹⁶ But according to a subsequent decision, this statement of the law is incorrect.¹⁷

§ 212. Intention of Parties.—As indicated above,¹⁸ parties may, by express provision, make time of the essence of a contract.¹⁹ The courts will not inquire into the motive or the sufficiency of the motive that induced parties to contract that time should be essential in the per-

36 Cal. App. 248, 171 Pac. 982; Mettler v. Vance, 30 Cal. App. 499, 158 Pac. 1044.

15. Beverly v. Blackwood, 102 Cal. 83, 36 Pac. 378; Newton v. Hull, 90 Cal. 487, 27 Pac. 429; Steele v. Branch, 40 Cal. 3.

16. Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280. It is to be noted that although this case is overruled as to the above proposition by Newton v. Hull, 90 Cal. 487, 27 Pac. 429, the further proposition involved and decided, viz., that when a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments paid of the purchase money, less the actual damage to the vendor occasioned by his breach of contract, has never been

reversed or modified and is supported by the following cases: Law Credit Co. v. Tibbitts, 160 Cal. 629, 117 Pac. 773; Bradford v. Parkhurst, 96 Cal. 102, 31 Am. St. Rep. 189, 30 Pac. 1106; Phelps v. Brown, 95 Cal. 572, 30 Pac. 774; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749. See also, VENDOR AND PURCHASER.

17. Newton v. Hull, 90 Cal. 487, 27 Pac. 429.

18. See supra, § 211.

19. Martin v. Morgan, 87 Cal. 203, 22 Am. St. Rep. 240, 35 Pac. 350; Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280 (holding time of the essence of the contract); Grey v. Tubbs, 43 Cal. 359; Cole v. Merchants' Trust Co., 34 Cal. App. 82.

formance of an agreement.²⁰ The intention to make time the essence must govern, and no particular form of stipulation is necessary; any clause will have that effect which clearly provides that the contract is to be void if the fulfillment is not within the prescribed time.¹ Time may be made of the essence of a contract without employing that precise expression.² This is the rule under section 1492 of the Civil Code.³ The code provision is intended to adopt the rule that equity will not permit a forfeiture, except when the parties have so expressed their intent, or it is to be clearly inferred. Such intention is sufficiently expressed when the contract provides that performance must be on time or, the party or parties shall lose their rights under it, or when performance must be on time in order to entitle a party to performance by the other party.⁴ But it is not enough that a time merely be specified during which, or before which, an act must be done.⁵ Thus an agreement in a contract that a road should be extended to a specified point "within four months, weather permitting," not being expressly made a condition precedent, nor declared to be of the essence of the contract, is not to be construed as making the time therein specified of the essence.⁶

§ 213. Subject Matter and Surrounding Circumstances.

Notwithstanding the provisions of section 1492 of the Civil Code,⁷ it would seem that the question whether time is of the essence of a contract is to be determined not only from the terms of the contract, but also from a consid-

20. *Grey v. Tubbs*, 43 Cal. 359.

1. *Williams v. Long*, 139 Cal. 186, 72 Pac. 911; *Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep. 240, 25 Pac. 350; *Grey v. Tubbs*, 43 Cal. 359; *Steele v. Branch*, 40 Cal. 3.

2. *Skookum Oil Co. v. Thomas*, 169 Cal. 539, 123 Pac. 363.

3. *Miller v. Cox*, 96 Cal. 339, 31 Pac. 161; *Bennett v. Hyde*, 92 Cal.

131, 28 Pac. 101. Section 1492 of the Civil Code is quoted *supra*, § 211.

4. *Bennett v. Hyde*, 92 Cal. 131, 28 Pac. 101.

5. *Miller v. Cox*, 96 Cal. 339, 31 Pac. 161.

6. *Witmer Bros. Co. v. Weid*, 108 Cal. 569, 41 Pac. 491.

7. Quoted *supra*, § 211.

eration of the subject matter.⁸ In mercantile contracts, such as agreements for the manufacture and sale of goods and the like, it is generally held that the parties have intended to make time the essence.⁹ And the same is true when the character of the property renders it liable to fluctuations in value. This is especially true of mining property.¹⁰ So, too, the decisions concur in holding that in an option contract, because of its one-sided nature, time is of the essence.¹¹

In the very nature of the case it is impossible to prescribe any general and uniform rule on this subject, and each case must necessarily be decided upon its own circumstances.¹² In a decision rendered prior to the adoption of the code, the following rule was laid down:

“The court will always inquire into the time when a thing is to be done, as they will into any other part of the contract. If the thing to be done—whether a conveyance of land, or anything else—can be as well done at a later time, as an earlier, or the reverse, and certainly without detriment to the party called upon to do the thing, then time is not, in fact, of the essence of the contract, and will be regarded by the court, or rather disregarded, accordingly, provided the parties have not themselves expressly agreed that the time shall be treated as essential or made it so by their contract. But if it seems that the whole value, or a material part of the value of the transaction, to the defendant, depends upon its being done at a certain time, and no other, or that the substitution of any other will subject him in any way to loss or material inconvenience, then time is certainly

8. *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363; *Williams v. Long*, 139 Cal. 186, 72 Pac. 911. See *BROKERS*, vol. 4, p. 589, for application of rule to commissions for sale of property.

9. *Condley v. Consol. Lumber Co.*, 35 Cal. App. Dec. 299, 200 Pac. 69; *Condley v. Consolidated Lumber Co.*, 35 Cal. App. Dec. 299, 200 Pac.

69 (citing *Minaker v. California Canneries Co.*, 138 Cal. 239, 71 Pac. 110; *Jensen v. Goss*, 39 Cal. App. 427, 179 Pac. 225).

10. *Williams v. Long*, 139 Cal. 186, 72 Pac. 911.

11. See *supra*, § 31.

12. *Miller v. Cox*, 96 Cal. 330, 31 Pac. 161.

of the essence of the contract, so far as he is concerned, and the court will so regard it."¹³

Even though a contract contains a provision for forfeiture in case of a failure to perform strictly in point of time, a court of equity will examine the whole contract in the light of the surrounding circumstances, to ascertain whether it was the real intention that the party in default should lose the right secured to him by the contract. A stipulation to the effect that in case of a default a party shall lose his rights is often inserted by way of penalty, merely with a view to induce a more prompt performance, and not with the intention that a failure strictly to perform, in point of time, shall work an absolute forfeiture. When such appears to have been the intention, if the party in default afterwards tenders a performance with reasonable diligence, and if the other party has suffered no damage by the delay, and particularly if the property has not materially enhanced in value during the time of the delay, equity will not enforce the forfeiture, but will decree specific performance, notwithstanding the default, provided it appears that the party in default has acted in good faith and gives some reasonable excuse for the delay.¹⁴

§ 214. Waiver of Requirement.—A provision making time of the essence of a contract may be waived, either expressly or by conduct, by the party for whose benefit it is inserted.¹⁵ But obviously, the conduct that will operate as a waiver of the provision must be with reference to the particular contract involved and not to some other transactions.¹⁶ If the time of performance is once waived, even when it is made of the essence, the matter

13. *Green v. Covilland*, 10 Cal. field Oil Co., 31 Cal. App. Dec. 640, 317, 70 Am. Dec. 725. 189 Pac. 317; *Webber v. Herbert*,

14. *Steele v. Branch*, 40 Cal. 3. 31 Cal. App. Dec. 454, 188 Pac. 819. See *VENDOR AND PURCHASER*.

15. *Daly v. Ruddell*, 137 Cal. 31 Cal. App. Dec. 640, 189 Pac. 671, 70 Pac. 784; *Genereux v. Rich-* 317.

is set at large, and another date of performance can only be fixed by a definite notice, or by conduct equivalent thereto.¹⁷

Where time is made of the essence of a contract for the payment of money, and this covenant has been waived by the acceptance of payments after they are due, with knowledge of the facts, such conduct will be regarded as creating such a temporary suspension of the right of forfeiture, and it can be restored only by giving a definite and specific notice of an intention to enforce it.¹⁸ And although, in an original contract for the sale of real estate, time is made of the essence and provision is made for forfeiture of payments if other payments are in default for a certain period, a supplemental agreement substituting personal services to be rendered within a different period, instead of cash payment, without provision therein for forfeiture, eliminates that feature from the contract by necessary implication.¹⁹ But it has been held that the acceptance of payments after they become due will not constitute a waiver of the strict performance of the clause in a contract for the sale of personal property making time of the essence, when the contract also expressly provides that the acceptance of overdue payments by the seller shall not constitute a waiver of that provision.²⁰ Nor

17. *American-Hawaiian Eng. etc. Co. v. Butler*, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280 (building contract).

18. *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947 (sale of land); *Burnmester v. Horn*, 35 Cal. App. 549, 170 Pac. 674 (citing authorities). But see *Hoppin v. Munsey*, 61 Cal. Dec. 602, 198 Pac. 398, wherein the court says: "On general principles there can be no doubt that if, after such waiver as the law infers from acceptance of partial payments after maturity, the conduct of the vendor and vendee in subsequent dealings is such as to

justify the inference that both parties understood that the conditions regarding forfeiture were to be treated as restored and were in force, and that the vendee understood that he was then in default, and the vendor may have the advantage of the forfeiture as completely as he may obtain it by a definite notice to the vendee. . . ." See *VENDOR AND PURCHASER*.

19. *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131.

20. *Pacific Finance & Invest. Co. v. Pierce*, 32 Cal. App. Dec. 880, 191 Pac. 1115.

is the provision of a contract of agency for the sale of lots making time of the essence disturbed by the making of a new agreement between the parties and a trust company, in view of a further provision declaring that it was intended by the agreement to carry out the original contract as modified by extending its life to a stated date.¹ And the right to declare time of the essence of a contract for the sale of real property after default in making payment is not waived by the vendor in thereafter making no protest against the efforts of the vendees to sell the property and in the making of surveys, where the contract contains no requirements that the vendees should perform such acts.²

§ 215. Place of Performance.—The general rule affecting the determination of the liabilities of parties to a contract requires that the law of the place where the contract is made shall govern. This rule admits of some variation in practice, dependent sometimes upon the question as to where the contract is to be performed, and always subject to the intention of the parties as expressed or implied from their conduct at the time of making the contract.³ The place at which a contract bears date is *prima facie* the place where it was made; and it is a fair deduction that a contract is to be entirely performed at the place where it was made and where payment is to be made.⁴ Ordinarily, in a suit upon a contract, where no place of performance is expressly named, it ought to be held performable in the place where the circumstances,

1. *Cole v. Merchants' Trust Co.*, 34 Cal. App. 82, 166 Pac. 871. See *BROKERS*, vol. 4, p. 589, as to application of rules as to time being of the essence to brokerage contracts.

2. *Newhall Land & Farming Co. v. Burns*, 31 Cal. App. 549, 161

Pac. 14. See *VENDOR AND PURCHASER*.

3. *Bertonneau v. Southern Pac. Co.*, 17 Cal. App. 439, 120 Pac. 53. See *CONFLICT OF LAWS*, vol. 5, p. 452.

4. *Hammond v. Ocean Shore Dev. Co.*, 22 Cal. App. 167, 133 Pac. 978.

viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed.⁵

Conditions.

§ 216. **Generally.**—“An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.”⁶ It is competent for parties to insert such conditions in their contracts as they desire,⁷ and it is a fundamental rule that what one may refuse to do entirely, he may agree to do on such terms as he pleases.⁸ But, it has been declared, when the terms of an instrument are in themselves clear, it is necessary that the conditions upon which, only, it is claimed that the instrument is to have effect, should be equally clear.⁹ Of course, “A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the article on the object of contracts, or which is repugnant to the nature of the interest created by the contract, is void.”¹⁰

The effect of a condition cannot be determined without taking into consideration the stipulations that it qualifies, and it will be construed, as far as possible, so as to give efficiency to the entire contract. The construction depends upon the intention of the parties, to be collected from the terms of the agreement itself and from the subject matter to which it relates. Whether a provision in a contract is a stipulation or a condition is to be gathered

5. *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964; *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 65 L. R. A. 90, 74 Pac. 855; *Lakeside Ditch Co. v. Packwood Ditch Co.*, 33 Cal. App. Dec. 754, 195 Pac. 284. See *infra*, § 243, as to time and place of offer of performance. See CORPORATIONS; SALES.

6. Civ. Code, § 1434.

7. *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515.

8. *McCaslin v. Southern Pac. Co.*, 34 Cal. App. Dec. 851.

9. *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515. See note in 1 *California Law Review*, p. 71, as to validity of condition against assignment in contract.

10. Civ. Code, § 1441. See *supra*, § 58 et seq., as to legality of object.

from the document.¹¹ Words of proviso and condition will be construed into words of covenant when such is the apparent intent and meaning of the parties.¹² The word "provided" does not necessarily impose a condition.¹³ Conditions may be precedent, concurrent or subsequent.¹⁴

Any condition of a contract may be waived,¹⁵ but only by the party for whose benefit it was intended.¹⁶ Such a waiver may be established by evidence of an express agreement, or may be inferred from circumstances.¹⁷ And, it has been declared, the admission of parol evidence to show a waiver of a condition does not violate the rule prohibiting parol evidence to vary or contradict a written contract.¹⁸

§ 217. Express or Implied.—Conditions in contracts are not necessarily express. In some instances implied obligations are added by construction of law,¹⁹ such a construction being expressly authorized by section 1655 of the Civil Code.²⁰ But a term or condition will be implied

11. *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 73 Pac. 966 (quoting from *Wharton on Contracts*).

12. *Diepenbrock v. Luiz*, 159 Cal. 716, Ann. Cas. 1912C, 1084, L. R. A. 1915C, 234, 115 Pac. 743 (holding proviso in lease that lessor could sell during term and terminate lease upon payment of cost of improvements to lessee was covenant, and term of lessee was not ended upon such sale until such payment was made); *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 73 Pac. 966 (stipulation in contract for payment of money to plaintiff by defendant that plaintiff shall obtain consent of plaintiff's divorced husband, who refused to give his consent, is a covenant and not condition precedent). See COVENANTS as to distinction between conditions and covenants.

13. *Diepenbrock v. Luiz*, 159 Cal. 116, Ann. Cas. 1912C, 1084, L. R. A. 1915C, 234, 115 Pac. 743; *Bowers' California Dredging Co. v. San Francisco Bridge Co.*, 132 Cal. 342, 64 Pac. 475.

14. Civ. Code, § 1435. See *infra*, §§ 219-221.

15. *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 Pac. 740; *Gillon v. Northern Assur. Co.*, 127 Cal. 480, 59 Pac. 901. And see *infra*, § 257.

16. *Blethen v. Blake*, 44 Cal. 117.

17. *Kling v. Bucher*, 32 Cal. App. 679, 163 Pac. 671.

18. *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 Pac. 740.

19. *Redpath v. Evening Express Company*, 4 Cal. App. 361, 88 Pac. 287.

20. See *supra*, § 189, as to terms implied as part of contract.

only where the implication is necessary in order to effect the purpose and intent of the agreement.¹

§ 218. Condition Involving Forfeiture.—A forfeiture stipulated in a contract will be enforced if the rights of the parties cannot otherwise be preserved.² But a contract is not to be construed to provide a forfeiture, unless no other interpretation is reasonably possible.³ The law does not favor forfeitures, and will not enforce them in the absence of clearly stated conditions of forfeiture.⁴ As provided by the Civil Code,

“A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.”⁵

In the construction of a conveyance or lease, ordinarily, to avoid a forfeiture, conditions will be construed as covenants, when this can reasonably be done; but a covenant, instead of a condition, will never be implied contrary to the real intention of the parties.⁶ In the absence of an express provision for a forfeiture, a time limit is to be construed as a covenant, and not a condition upon which to base a forfeiture.⁷ A provision in a contract of purchase and sale, to the effect that the violation of any

1. *Anderson v. Quick*, 163 Cal. 658, 126 Pac. 871, 872.

2. *Madison v. Northwestern etc. Ins. Co.*, 141 Cal. 475, 75 Pac. 113.

3. *New Liverpool etc. Co. v. Western etc. Co.*, 151 Cal. 479, 91 Pac. 152.

4. *Ciapucci v. Clark*, 12 Cal. App. 44, 106 Pac. 436. See **FORFEITURES; VENDOR AND PURCHASER.**

5. Civ. Code, § 1442; *Jameson v. Chanslor-Canfield M. Oil Co.*, 176 Cal. 1, 167 Pac. 369 (lease); *Reclamation District v. Van Loben Sels*, 145 Cal. 181, 78 Pac. 638 (deed); *Behlow v. Southern Pacific R. R. Co.*, 130 Cal. 16, 62 Pac. 295

(deed); *Randol v. Scott*, 110 Cal. 590, 33 Pac. 433 (lease); *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158, 28 Pac. 593 (contract for sale of real estate); *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153 (lease); *Hannah v. Southern Pac. R. R. Co.*, 32 Cal. App. Dec. 819, 192 Pac. 304 (deed).

6. *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512. And see *supra*, § 217. See **COVENANTS**, as to distinction between conditions and covenants.

7. *Ciapucci v. Clark*, 12 Cal. App. 44, 106 Pac. 436.

of the terms or conditions thereof by either party shall work a forfeiture, and that the contract shall thereupon become void and of no effect, means only that by a violation of the terms of the contract the rights of the party violating it cease, and as to him and to that extent, the agreement becomes void and of no effect. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent one.⁸

§ 219. Conditions Precedent.—A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.⁹ Courts are disinclined to construe stipulations of a contract as conditions precedent, especially when such course would work a forfeiture, for the reason that such a construction prevents doing justice according to the equities of the case. The rule is that stipulations

8. *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177; *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629.

9. Civ. Code, § 1436; *Van Bus Kirk v. Kuhns*, 164 Cal. 472, Ann. Cas. 1914B, 932, 44 L. R. A. (N.S.) 710, 129 Pac. 587 (promise by debtor to pay "when able"); *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919 (sale of citrus trees); *Bowers' California Dredging Co. v. San Francisco Bridge Co.*, 132 Cal. 342, 64 Pac. 475 (but holding contract giving right to use patents contained no condition precedent); *Langley v. Rodriguez*, 12 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 406 (sale of crop, advance to be made to vendor to enable him to gather and cure same); *Stockton v. Weber*, 98 Cal. 433, 33 Pac. 332 (conditional deed of land); *McLaughlin*

v. Clausen, 85 Cal. 322, 24 Pac. 636 (completion of road condition precedent to right to enforce payment of note); *Gilbert v. Judson*, 85 Cal. 105, 24 Pac. 643 (compensation for services in laying out lots for market to be paid in commissions on subsequent sales of lots); *Frisbie v. Moore*, 51 Cal. 516 (promissory note payable on condition that proceeding pending in courts was decided in favor of payee); *Bensley v. Atwill*, 12 Cal. 231 (sale of land, grantee to give grantor notice of suits by third persons against his title); *Fitch v. Brockmon*, 3 Cal. 348 (contract for interest in livestock); *Isbell v. Owens*, 1 Cal. Unrep. 322 (sale of mining property contract to be void "if the claim should fail to pay after testing").

are not to be construed as conditions precedent, unless the construction is made necessary by the terms of the contract.¹⁰ However, while it is true that conditions precedent are not favored, and are to be strictly construed against one seeking to avail himself of them, it is equally true that parties may, if they think proper, agree that any matter shall be a condition precedent; and if words are used so precise, express and strong that such intention only is compatible with the terms employed, a court can only give effect to such declared intention.¹¹

The question, then, whether acts stipulated for are such as that the performance of them is a condition precedent to the right to enforce performance by the other party is to be solved, not by any technical rules, but by ascertaining, if possible, the intention of the parties.¹² The only question in every case is whether such intention is so declared; and where such intention is sufficiently expressed to make the fulfillment of the act a condition precedent, it will be one.¹³

The intention of the parties is to be discovered rather from the order of time in which the acts are to be done than from the structure of the instrument, or the arrangement of the covenants.¹⁴ A provision in a contract that

10. *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 Pac. 325; *Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal. 348, 139 Pac. 807; *Lucy v. Davis*, 163 Cal. 611, 126 Pac. 490; *Diepenbrock v. Luiz*, 159 Cal. 716, Ann. Cas. 1912C, 1084, L. R. A. 1915C, 234, 115 Pac. 743; *Southern Pac. R. R. Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Deacon v. Blodgett*, 111 Cal. 416, 44 Pac. 159; *Front St. etc. Co. v. Butler*, 50 Cal. 574; *Wyman v. Hooker*, 2 Cal. App. 36, 83 Pac. 79; *Schweikert v. Seavey*, 6 Cal. Unrep. 554, 62 Pac. 602. See *supra*, § 218, as to conditions imposing forfeitures generally.

11. *Schwab v. Bridge*, 27 Cal. App. 204, 149 Pac. 603. And see *Warman etc. Co. v. Redondo Beach Chamber of Commerce*, 34 Cal. App. 37, 166 Pac. 856 (construing agreement as one to pay from particular fund to be provided in a specified manner and not as absolute promise).

12. *Ernst v. Cummings*, 55 Cal. 179.

13. *Schwab v. Bridge*, 27 Cal. App. 204, 149 Pac. 603 (holding condition had effect of making time of essence of contract).

14. *Ernst v. Cummings*, 55 Cal. 179.

payments will be made upon the presentation of the estimate or certificate of the engineer or architect superintending the work makes the production of such estimate or certificate a condition precedent to the right of payment, in the absence of a sufficient excuse for nonproduction.¹⁵ Similarly, under a provision in a contract, for the payment of such a sum as arbitrators shall award, the procuring of an award is as clearly a condition precedent to an action for a recovery as if the parties had expressly so provided.¹⁶ Where the obligation broken is not expressed in the contract, and is probably not thought of by the parties, and is merely added by legal construction, it cannot have been regarded by the parties as a condition precedent.¹⁷

When conditions precedent are invoked, practically to work a forfeiture, there can be no inadvertence or mistake, which will excuse nonperformance of the exact conditions of the contract, performance of which was incumbent upon the party insisting on the stringency of the rule.¹⁸ Equally is it true that a party will not be permitted to insist on the performance of a condition precedent when, by his own act, or by a departure from the terms of the contract, it is found that he has prevented the performance of such condition.¹⁹

15. *Coplew v. Durand*, 153 Cal. 279, 16 L. R. A. (N. S.) 791, 95 Pac. 38; *Tally v. Parsons*, 131 Cal. 516, 63 Pac. 833; *Cox v. McLaughlin*, 63 Cal. 196; *Loup v. California S. R. Co.*, 63 Cal. 97. See ARCHITECTS, vol. 3, pp. 106-110.

16. *Davisson v. East Whittier Land etc. Co.*, 153 Cal. 81, 96 Pac. 89; *Old Sausalito Land & Dock Co. v. Commercial Union Assur. Co.*, 66 Cal. 253, 5 Pac. 232; *Holmes v. Richet*, 56 Cal. 307, 38 Pac. 54; *Burke v. Dittus*, 8 Cal. App. 175, 96 Pac. 330 (but holding complaint did not show that any dispute had arisen under the contract which would require arbitra-

tion). See ARBITRATION AND AWARD, vol. 4, p. 49 et seq.

17. *Redpath v. Evening Express Co.*, 4 Cal. App. 361, 88 Pac. 287.

18. *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 73 Pac. 966. See *infra*, § 239, as to performance of conditions generally.

19. *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 316, 73 Pac. 966 (holding party estopped under facts stated from insisting on such performance); *Griffith v. Happersberger*, 86 Cal. 605, 25 Pac. 137, 487; *Houghton v. Steele*, 58 Cal. 421.

§ 220. **Conditions Concurrent.**—It is often difficult to determine whether conditions are independent or concurrent. Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.²⁰ When the promises of the parties go to the whole considerations on both sides, they are mutual and dependent conditions, and performance must be averred.¹ And when a contract for mutual acts does not contain a provision from which it can be inferred that one act was to precede the other, the law implies that the acts are to be done concurrently, and the mutual promises of the parties are dependent.² But when a promise goes only to a part of the consideration, and a breach thereof may be paid for in damages, it is an independent promise, and an action may be brought for a breach of it without averring performance by the plaintiff.³ So, too, where the promises of the parties are to be performed at different times, they are held to be independent, and the breach by one party of his promise does not excuse the performance by the other of his promise or relieve him of liability for damages for a breach thereof.⁴ An agreement by one party to sell and ship goods in first-class cases, and a promise by the other party to pay for the goods on the arrival of the bills of lading in due course of mail, it has been held, are independent, and are to be performed at different times.⁵

20. Civ. Code, § 1437; *Stockton Sav. & L. S. v. Hildreth*, 53 Cal. 721 (payment of debt by third person and release of debtor by creditor held to be concurrent condition).

1. *Ernst v. Cummings*, 55 Cal. 179. See *infra*, § 239, as to performance of conditions generally.

2. *Brennan v. Ford*, 46 Cal. 7; *Osborn v. Henry Cowell Lime etc. Co.*, 7 Cal. App. 67, 173 Pac. 492.

3. *Ernst v. Cummings*, 55 Cal. 179.

4. *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805; *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414; *Southern Pac. R. R. Co. v. Allen*, 112 Cal. 461, 44 Pac. 796; *Deacon v. Blodgett*, 111 Cal. 416, 44 Pac. 159; *Front St. M. & O. R. R. Co., v. Butler*, 50 Cal. 577.

5. *Wheelock v. Pacific Pneumatic Gas. Co.*, 51 Cal. 223.

If, in a contract for the sale of land, the purchase money is to be paid by installments, and a deed is not to be given until the whole price is paid, the promises of the vendee are independent, and the vendor may sue upon all of them, except the last, without averring a willingness to perform, on his part, or tendering a deed.⁶ Where, however, the delivery of possession and transfer of title by the vendor, and payment of purchase money by the purchaser, are to be simultaneous and concurrent, the conditions are mutual and dependent, and the vendor is not entitled to demand the purchase money until delivery of possession.⁷

§ 221. Conditions Subsequent.—A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon a party, if he chooses to avail himself of the condition.⁸ If a person agrees to do a thing upon the happening of a condition subsequent, the happening of such condition binds him.⁹ While no precise words are necessary to create a condition subsequent, still it must be created by express terms or by clear implication.¹⁰ This is especially true when such a condition is relied on to work a forfeiture.¹¹ But, although it is true that a condition subsequent involving a forfeiture is to be construed strictly as against the person for whose benefit it is intended,¹² yet where the intent to create such a condition is shown by clear and unmistakable language, it will be upheld.¹³

6. *Rourke v. McLaughlin*, 38 Cal. 196; *Hill v. Grigsby*, 35 Cal. 656. See **VENDOR AND PURCHASER**.

7. *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249.

8. Civ. Code, § 1438.

9. *Hall v. Los Angeles*, 74 Cal. 502, 16 Pac. 313.

10. *Hawley v. Kafitz*, 148 Cal. 393, 113 Am. St. Rep. 282, 3 L. R. A. (N. S.) 741, 83 Pac. 248; *White v. Hendley*, 35 Cal. App. 267.

11. *Behlow v. Southern Pac. R. Co.*, 130 Cal. 16, 62 Pac. 295. See *supra*, § 218.

12. Civ. Code, § 1442; *Firth v. Marovich*, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729; *Reclamation Dist. v. Van Loben Sels*, 145 Cal. 181, 78 Pac. 638. See *supra*, § 218. See **DEEDS**.

13. *Firth v. Marovich*, 160 Cal. 257, Ann. Cas. 1912D, 1190, 116 Pac. 729; *Firth v. Los Angeles*

Where, in a lease, it is provided that failure on the part of the lessees to perform any of the conditions embodied therein for a certain period shall render the lease null and void if the lessors shall elect, a forfeiture for breach of conditions can be declared only by the joint or concurrent action of all the lessors.¹⁴

Compensation.

§ 222. **Right to Compensation Generally.**—The right to recover compensation under a contract is to be determined from the contract itself; and in order to recover, the plaintiff must show performance according to the terms.¹⁵ Where the clause of a building contract dealing with payments during construction provides, simply, that the owner is to pay seventy-five per cent of the total contract price “as the work progresses,” the contractor’s right to seventy-five per cent accrues as the work progresses from day to day.¹⁶ But this conclusion cannot be applied to a contract which calls for payment of seventy-five per cent of the work completed on the first and fifteenth days of each month. The right to payment does not accrue until the specified dates arrive.¹⁷ If an entire contract does not provide for contingencies, and for a proportionate compensation for proportionate service, there can be no recovery of proportionate compensation upon a failure to wholly complete the performance. The court cannot

Pacific Land Co., 28 Cal. App. 399, 162 Pac. 935.

14. *Jameson v. Chanslor-Canfield M. Oil Co.*, 176 Cal. 1, 167 Pac. 369. See **LANDLORD AND TENANT**.

15. *Cunningham v. Kenney*, 105 Cal. 118, 45 Am. St. Rep. 30, 38 Pac. 645. See *Scanlan v. San Francisco etc. Ry. Co.*, 128 Cal. 586, 61 Pac. 271 (holding evidence of measurements of cubic contents of railroad embankment made by contrac-

tor’s engineer sufficient basis for decision of court). See **AGENCY**, vol. 1, p. 808 et seq.; **ARCHITECTS**, vol. 3, p. 102; **ATTORNEYS**, vol. 3, p. 679 et seq.; **BROKERS**, vol. 4, p. 575 et seq.; **MASTER AND SERVANT**; **PHYSICIANS AND SURGEONS**.

16. *Hettinger v. Thiele*, 15 Cal. App. 1, 113 Pac. 121.

17. *Savage v. Smith*, 170 Cal. 472, 150 Pac. 343.

make contracts for parties; it can only determine such contracts as they have made.¹⁸ Where a contract for keeping and feeding cattle provided two separate compensations for the contractor, and there was nothing to show that either was to be received in lieu of the other, it was held that the compensations were cumulative and the party performing the services was entitled to both.¹⁹

§ 223. Amount or Rate.—With reference to the rate or amount of compensation, as with regard to all other matters, a contract must receive a reasonable interpretation.²⁰ It has always been held that notwithstanding the declaration of the law that for nonrecording a contract is void, yet the contract price measures the contractor's right of recovery.¹ The reverse of this proposition is also true. The contract price equally measures the amount which the contractor is entitled to retain. Overpayments made to a contractor for work and labor in excess of the price fixed by a written contract may be recovered from the contractor notwithstanding the fact that the contract was void for failure to record the same.² A person who without objection has received compensation for services performed in accordance with the terms of his contract,

18. *Cunningham v. Kenney*, 105 Cal. 118, 45 Am. St. Rep. 30, 38 Pac. 645 (storage contract).

19. *Brady v. Wilcoxson*, 44 Cal. 239.

20. *Payne v. Cunningham*, 175 Cal. 166, 165 Pac. 531. (A contract employing a superintendent for the construction of a building, and agreeing to pay him a percentage upon the cost provided the structure was completed for an amount not exceeding a stated sum, and further providing that should the superintendent fail to keep within the maximum cost, "then no charge shall be made for such superintend-

ence for such excess," should not be construed as releasing the owner from the obligation to pay the percentage charge on the maximum cost fixed by the contract, in the event the cost exceeded that amount, but that as to such excess only no charge should be exacted by the superintendent.) See *supra*, § 169, as to reasonableness of interpretation.

1. *Atchison etc. Ry. Co. v. West*, 176 Cal. 148, 167 Pac. 868. See *supra*, § 157.

2. *Atchison etc. Ry. Co. v. West*, 176 Cal. 148, 167 Pac. 868 (citing authorities).

the same being a reasonable compensation, cannot subsequently recover an additional amount.³

Where there is no provision for the measure of compensation, the law implies a promise to pay a reasonable amount.⁴ Section 1611 of the Civil Code provides:

“When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.”⁵

Under this provision, if the parties to a lease are unable to agree upon the amount of a reduction proper to be made, under the terms of the contract, upon the happening of a contingency, the subject, under proper allegations in the nature of an equitable action, should be submitted to the court in an action to have it determine the reasonable rental value of the premises for the remainder of the term, and such determination will constitute the defendant's liability under the terms of the lease, as though originally written therein.⁶

Where it appears that there can be no difficulty in determining the amount due under a contract, the fact that it does not expressly provide a specific method is immaterial.⁷ It has been held that in payment to a contractor for erecting a building, deduction cannot be made for money given, without his prior authority or subsequent ratification, to satisfy a demand by a subcontractor.⁸

§ 224. Extra Work.—Not infrequently provisions are inserted in building and construction contracts to control

3. *Brandt v. Fresno Hotel Co.*, 173 Cal. 209, 159 Pac. 434.

4. *Keller v. Gerber*, 33 Cal. App. Dec. 433, 193 Pac. 809. See **WORK AND LABOR**.

5. *Security Trust & Savings Bank v. Claussen*, 30 Cal. App. Dec. 842, 187 Pac. 142; *Nave v. Taugher*, 33 Cal. App. Dec. 173, 193 Pac. 508.

6. *Security Trust & Savings Bank v. Claussen*, 30 Cal. App. Dec. 842, 187 Pac. 142.

7. *San Francisco Bridge Co. v. Dumbarton Land etc. Co.*, 119 Cal. 272, 51 Pac. 335.

8. *Miller v. Board of Education*, 1 Cal. Unrep. 607.

in case extra work may appear to be necessary or desirable while the construction is going on.⁹ "Extra work" is, of course, work not included in the contract.¹⁰ In cases where extra work is caused by authorized deviations from a contract, and no agreement is made regarding the price thereof, or payment therefor, the law implies an agreement to pay its reasonable value.¹¹ Even in the case of a contract for an entire work for a stipulated sum, the contractor may recover additional compensation for extra work necessitated by an accident which is due to the fault of the owner or his employees.¹²

Where a building contract binds the contractor to do the work under an architect's direction, the owner is liable to the contractor for extra work ordered by the architect.¹³ If, however, a contract provides that the contractor shall not deviate from the contract, nor receive any pay for extra work, unless a written order for the same is signed by the engineer or architect superintending the work, the contractor cannot recover for extra work done on the verbal order of the engineer or architect,¹⁴ even if there is another clause in the contract which provides that the

9. *Meigs v. Bruntsch*, 54 Cal. 601 (holding that upon findings plaintiff was not entitled to judgment for extra work). See *Wyman v. Hooker*, 2 Cal. App. 36, 83 Pac. 79 (holding that where the evidence shows that the extra work on the building was done with the knowledge and consent of the owner and his agent, and that they waived the written stipulation for a separate written estimate of extra work by orally agreeing to and countenancing the work without written estimates, which would not have been done but for such consent of the owner, he will not be permitted to repudiate work done in the manner that he consented to, on the ground that it was not done in

accordance with a previous written agreement).

10. *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933.

11. *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933; *O'Connor v. Dingley*, 26 Cal. 21; *Mowry v. Starbuck*, 4 Cal. 274; *De Boom v. Priestly*, 1 Cal. 206. And see *supra*, § 223.

12. *McConnell v. Coronà City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929.

13. *Scribante v. Edwards*, 40 Cal. App. 561, 181 Pac. 75.

14. *Gray v. La Societe Francaise etc.*, 131 Cal. 566, 63 Pac. 848; *White v. San Rafael etc. B. B. Co.*, 50 Cal. 417.

latter may direct alterations in, and additions to, the work.¹⁵

When a contract provides that claims for extra work shall be submitted to arbitration, suit cannot be brought for such work until the claimant has made offer to arbitrate.¹⁶ A provision in a building contract that all disputes as to the meaning of the specifications shall be settled by the architects, however, has no application to a dispute as to extra work on adjacent property, which work is entirely outside the contract.¹⁷

If the character of services performed and the specifications, considered together, fairly convey the inference that the services are a part of the work called for by the contract, they will not be treated as extra work.¹⁸ Where there is a substantial conflict of testimony as to a contractor's claim for extra work, the reviewing court will not interfere with the decision of the trial court.¹⁹

X. MODIFICATION AND MERGER.

§ 225. Modification Generally.—One executory agreement is not necessarily extinguished by the mere execution of another between the same parties, even though the latter concerns the same subject matter as the first.²⁰ However, it is entirely competent for the parties to an executory contract to modify or waive their rights under it, and to ingraft new terms upon it,¹ and the original

15. *White v. San Rafael etc. R. R. Co.*, 50 Cal. 417.

16. *Davisson v. East Whittier Land etc. Co.*, 163 Cal. 81, 96 Pac. 88; *Gray v. La Societe Francaise etc.*, 131 Cal. 566, 63 Pac. 848; *Scammon v. Denio*, 72 Cal. 393, 14 Pac. 98; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54. See ARBITRATION AND AWARD, vol. 3, p. 49 et seq.

17. *Alta Planing Mill Co. v. Garland*, 167 Cal. 179, 138 Pac. 738.

18. *Schmohl v. Simpson & Co.*, 29 Cal. App. Dec. 107, 183 Pac. 350.

19. *Clark v. Collier*, 100 Cal. 256, 34 Pac. 677; *Lowry v. Law*, 27 Cal. App. 483, 150 Pac. 660.

20. *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828.

1. *Main St. etc. R. R. Co., v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937; *Sullivan v. Grasse Valley Milling & Mining Co.*, 77 Cal. 418, 19 Pac. 757 (contract to do specified amount of tunneling).

contract may expressly provide for modifications.² Section 1697 of the Civil Code provides that

“A contract not in writing may be altered in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration.”³

Under section 1698 of the Civil Code,

“A contract in writing may be altered by a contract in writing, or by an executed oral agreement, but not otherwise.”⁴

Thus, it has been declared, speaking of the latter provision, that the only two methods by which a contract in writing may be altered are prescribed, and all others, as by waiver or by estoppel, are excluded.⁵ It is apparent from the foregoing code provisions that consent plays as important a part in the modification of a contract as in the original making thereof. A tripartite agreement, it has been held, cannot be modified without the consent of all the parties concerned.⁶

It often occurs that a partial rescission results from deviations from the original plans of a building contract, made by explicit direction of the employer, or with his

2. *Stewart Law etc. Co. v. Krambs*, 139 Cal. 318, 73 Pac. 854 (contract for newspaper route); *Stohr v. San Francisco Musical Fund Society*, 82 Cal. 557, 22 Pac. 1125 (contract of member with mutual benefit association is subject to modification by change in by-laws of association); *Pacific Mfg. Co. v. Perry*, 31 Cal. App. 274, 160 Pac. 246 (building contract).

3. *Ward v. Matthews*, 73 Cal. 13, 14 Pac. 604 (extension of time for payment for land); *Morehouse v. Morehouse*, 6 Cal. Unrep. 966, 69 Pac. 625 (subsequent opinion in bank, 140 Cal. 88, 73 Pac. 738).

4. *Stone v. Harris*, 146 Cal. 555,

80 Pac. 711 (holding agreement unmodified). See, also, *Code Civ. Proc.*, § 1932, to the effect that a writing under seal may be changed or altogether discharged by a writing not under seal. See SEALS.

See *infra*, § 226, as to oral modification of written contract.

5. *G. S. Johnson Co. v. Nevada Packard Mines Co.*, 272 Fed. 291 (citing *Beeson v. Wright*, 159 Cal. 133, 112 Pac. 1091; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060; *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147).

6. *Ehrman v. Rosenthal*, 117 Cal. 491, 49 Pac. 460. As to consent

consent and acquiescence, and by such departures other work is substituted with other prices agreed to, or implied. In such cases the omission of the particular work excluded by the substitution is not a violation of, but is dispensed with by the modification of the contract. The contractor may then be entitled to recover the contract price with increase or subject to such diminution as is produced by the change of plan, on a quantum meruit.⁷

The question whether a contract has been modified is one of fact where there is evidence upon the point sufficient to go to the jury, and the court in such case may properly refuse to instruct that there is no proof sufficient in law to modify the written contract.⁸

Modification by agent.—Presumptively an agent is employed to make contracts, and not to modify or rescind them, to acquire interests, not to give them up, and no power to vary or cancel an agreement is to be inferred from a general power to make it, nor has an agent any implied power to waive or give up rights or interests of his principal, unless the principal knew or approved of such modifications by the agent. However, a general agent may act under such broad power to contract in his own name, or to make terms or to settle upon his own discretion, as to overcome this presumption, and bind the principal by a modification, rescission or release.⁹ Where a contract prohibits any modification of its terms unless the same is indorsed upon it by the president of the contractor, a corporation, an agent of the contractor is clearly without power to vary by verbal agreement the terms so as to provide for a shorter time for performance.¹⁰ Nor can a contract be varied by evidence of subsequent state-

generally, see *supra*, §§ 22-57.

7. *City Street Imp. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933.

8. *Norddeutschen etc. v. Bertheau*, 79 Cal. 495, 21 Pac. 975.

9. *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823 (quoting

from 31 Cyc. 1387). See *AGENCY*, vol. 1, p. 712 et seq., as to authority of agent generally.

10. *Brookings Lumber & B. Co. v. Manufacturers' etc. Co.*, 173 Cal. 679, 161 Pac. 266.

ments by an alleged agent of one party, where the contract expressly declares that no agent has authority to alter its terms, and no attempt is made to establish any power in the agent so to do.¹¹

§ 226. Oral Modification of Contract in Writing.—Prior to the amendment of 1874 to section 1698 of the Civil Code, that section expressly permitted the time for the performance of a contract in writing to be extended by a subsequent oral agreement.¹² The section as amended provides that a written contract may be modified by an oral agreement only when such oral agreement has been executed.¹³

11. *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751.

12. See *supra*, § 210.

13. *Ohio Electric Car Co. v. Le Sage*, 182 Cal. 450, 188 Pac. 982 (guaranty); *Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156 (applying rule to oral account stated); *Molera v. Cooper*, 173 Cal. 259, 160 Pac. 231 (holding unexecuted parol agreement ineffectual to alter or extinguish note); *Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203 (lease); *Wright v. Beeson*, 159 Cal. 133, 112 Pac. 1091 (unexecuted oral promise to pay balance due on stock of corporation); *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 157, 159 (holding oral agreement for exchange of lands was new agreement and enforceable when completely executed on one side); *Estate of McDonald*, 146 Cal. 196, 79 Pac. 875 (executed oral agreement to reduce interest on mortgage note); *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88 (evidence of parol agreement to change time for payment of rent under lease held inadmissible); *Henahan v. Hart*, 127 Cal. 656, 60 Pac. 426 (unexecuted oral agreement with reference to extension of time for

payment of note); *Stockton etc. Works v. Glens Falls Ins. Co.*, 121 Cal. 167, 53 Pac. 565 (executed oral agreement varying insurance policy); *Anderson v. Johnston*, 120 Cal. 657, 53 Pac. 264 (building contract); *Thompson v. Gerner*, 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900 (promissory note); *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147 (sale of realty); *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217 (sale of land); *Taylor v. Soldati*, 68 Cal. 27, 8 Pac. 518 (lease); *Erenberg v. Peters*, 66 Cal. 114, 4 Pac. 1091 (lease); *Rottman v. Hevener*, 36 Cal. App. Dec. 358 (extension of time of payment); *Kashiki v. California Growers & Shippers, Inc.*, 35 Cal. App. Dec. 575, 200 Pac. 357 (holding unexecuted parol modification did not affect written contract); *Anderson v. Adler*, 42 Cal. App. 776, 184 Pac. 42 (executed oral agreement modifying terms of lease as to rent); *Peterson v. Wagner*, 34 Cal. App. Dec. 823, 198 Pac. 25 (sale of crop of hops); *Arsenio v. Smith*, 33 Cal. App. Dec. 630, 194 Pac. 756; *Glad- ding, McBean & Co. v. Montgomery*,

Obviously, the executed oral agreement which may be proved for the purpose of altering a previous written contract must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing.¹⁴

According to section 1661 of the Civil Code, an executed agreement is one "the object of which is fully performed. All others are executory."¹⁵ An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligations of both parties in order to bring the modification

20 Cal. App. 276, 128 Pac. 790 (contract to tile roof); *Puritas Laundry Co. v. Green*, 15 Cal. App. 654, 115 Pac. 660 (contract between laundry and owner of driver's route); *Beaver v. Continental Bldg. etc. Assn.*, 15 Cal. App. 190, 116 Pac. 1105 (agreement for trust deed); *Jewell v. Colonial Theater Co.*, 12 Cal. App. 681, 108 Pac. 527 (oral agreement with reference to pay of actress held executed); *Standard Box Co. v. Mutual Biscuit Co.*, 20 Cal. App. 746, 103 Pac. 938 (holding alleged oral agreement modifying contract was not executed, and did not affect contract); *Righetti v. Righetti*, 5 Cal. App. 249, 90 Pac. 50 (executed oral agreement to waive payment of interest on note after maturity); *Brenneke v. Smallman*, 2 Cal. App. 306, 311, 83 Pac. 302 (holding oral evidence of verbal agreement to extend time for payment of note inadmissible); *Hause v. Phillips*, 2 Cal. App. 15, 82 Pac. 1127 (pasturage agreement held executed); *Haines v. Stilwell*, 5 Cal. Unrep. 27, 40 Pac. 332 (sale of corporation stock); *G. S. Johnson Co. v.*

Nevada Packard Mines Co., 272 Fed. 291; *In re Turpin Hotel Co.*, 248 Fed. 25, 160 C. C. A. 165 (executed parol agreement for rent reduction). See *McDonald v. Mountain Lake Water Co.*, 4 Cal. 335 (decided before the adoption of the codes, and declaring that a parol variation of a written agreement, after its execution, will be upheld on the ground that no one will be allowed to take advantage of the nonperformance of that which he prevented). See, also, *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371 (holding owner estopped by conduct from complaining of changes in building plans). And see *Lassing v. Paige*, 51 Cal. 575 (holding evidence did not tend to show modification of contract, but rather that defendant intended to rely upon written contract).

14. *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36 (citing Civ. Code, §§ 1595, 1605, 1661).

15. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159. See *supra*, § 11, as to executed contracts generally.

within the terms of the statute.¹⁶ Under section 1698 of the Civil Code, an executed oral modification of a written contract is not required to be made at the time of the inception of the written contract, but the code provisions are complied with by a subsequent executed oral modification of the written contract.¹⁷ The date when an oral agreement takes effect as altering a written contract is the date when it is executed. It then has the same effect as an agreement in writing of that date altering the original contract.¹⁸ An oral agreement substituted by novation for a former written contract is not an oral modification of the written contract within the meaning of section 1698 of the Civil Code, provided the substituted oral agreement is valid and enforceable.¹⁹

Some attempt has been made to confine the application of section 1698 of the Civil Code to contracts ^{NOT} required by law to be in writing.²⁰ However, it would seem that the section applies to written contracts generally.¹ It lays down the salutary rule in regard to written instruments which forbids the admission of parol evidence to vary their terms.² Nor, on the other hand, can the position be taken that this section of the code refers only to contracts not required to be in writing by the statute of frauds.³

See "Erratum",
1926 Supp. 463

16. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159; *Harloe v. Lambie*, 143 Cal. 133, 64 Pac. 88; *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060; *Thompson v. Gerner*, 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900; *Dean v. Sedan Milling Co.*, 19 Cal. App. 28, 124 Pac. 736.

17. *Oatman v. Eddy*, 4 Cal. App. 58, 87 Pac. 210.

18. *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060.

19. *Pearsall v. Henry*, 153 Cal.

314, 95 Pac. 154, 159 (citing *Adler v. Friedman*, 16 Cal. 137); *Credit Clearance Bureau v. George A. Hochbann Contracting Co.*, 25 Cal. App. 546, 144 Pac. 215; *Proud v. Strain*, 11 Cal. App. 74, 103 Pac. 949. See NOVATION.

20. *Donlon v. Meyer*, 35 Cal. App. 225, 169 Pac. 447; *Boyd v. Big Three Ranch Co.*, 22 Cal. App. 108, 133 Pac. 623.

1. See cases cited *supra*.

2. *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426.

3. In *re Turpin Hotel Co.*, 248 Fed. 25, 160 C. C. A. 165.

Regardless of the rule requiring modifications of written contracts to be evidenced by writing, one party to a contract may not, on the pretense of desire on his part to depart from the exact performance of a nonessential detail, induce the other party to believe that delivery of goods sold will not be made, either at the time or place specified in the contract, and then take advantage of the other's reliance upon his representations.⁴ To apply section 1698 of the Civil Code to such a state of facts would, it has been said, be to make it an engine for the perpetration of fraud, instead of a defense against it.⁵ When a written contract is uncertain in its terms, parol evidence of a subsequent agreement between the parties making such terms definite is admissible.⁶

§ 227. **Consideration.**—The variation of an agreement is as much a matter of contract as the original agreement, and a contract for such variation, equally with other contracts, requires a consideration to support it; though this of course may consist either in a new consideration or in some favorable modification of the original contract.⁷ This rule applies as well to an agreement to extend the time for payment as to any other modifying agreement.⁸ There is an exception to this rule provided for in the ~~Code of Civil Procedure~~ ^{61 Cal. 630}, section 1697, in the case of parol contracts; but this has no application to written contracts.⁹

(See "Erratum",
1926 Supp 463)

4. Bidegaray v. Ormaca, 32 Cal. App. Dec. 941, 192 Pac. 176.

5. Bidegaray v. Ormaca, 32 Cal. App. Dec. 941, 192 Pac. 176.

6. Katz v. Bedford, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523 (holding parol evidence admissible to show understanding of parties as to mode of measurement of work included in written contract to build sidewalk).

7. Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257 (holding written modification of contract for sale of corporate stock supported by sufficient

consideration); Estate of McDougald, 146 Cal. 196, 79 Pac. 875 (holding agreement for reduction of interest on mortgage note supported by sufficient consideration); Main St. etc. R. Co. v. Los Angeles Traction Co., 129 Cal. 301, 61 Pac. 937. As to requirement of consideration generally, see supra, § 115.

8. Connolly v. Hingley, 82 Cal. 642, 23 Pac. 273; Hughes v. Davis, 40 Cal. 117. See PAYMENT.

9. Main St. etc. R. Co. v. Los Angeles Traction Co., 129 Cal. 301, 61 Pac. 937.

§ 228. Effect of Modification.—A modification of a contract takes effect according to the intention of the parties, and operates to annul any existing provision which it is intended to supplant.¹⁰ A severable part may be waived or modified by the parties without a cancellation or avoidance of the whole contract.¹¹ Obviously, the obligations of a written contract are not changed in any degree by a subsequent verbal agreement for its modification, which is rendered impossible of performance by the joint act of the parties.¹² When a contract is not changed by a subsequent agreement, and the party seeking recovery is not prejudiced thereby or induced to vary from a strict fulfillment there can be no recovery except in accordance with the terms of the contract.¹³

Section 1698 of the Civil Code, it has been declared, does not prevent a plaintiff from suing on the original written contract, where a parol variation is unexecuted, as the rule that neither party to an action can at law avail himself of an unexecuted parol agreement to vary the terms or enlarge the time for performing a contract previously entered into in writing, and required so to be by the statute of frauds, serves rather to preclude the defendant from setting up an agreement to enlarge the time for performance than to prevent the plaintiff from suing on the original contract for a breach of it.¹⁴ It is settled, however, that where the terms of a special contract have been modified by agreement, an action for the amount due for work and labor should be in the form of *indebitatus assumpsit*, and not upon the contract. Otherwise, the

10. *McGinley v. Hardy*, 18 Cal. 115.

11. *Rothwell v. Vaughn*, 33 Cal. App. Dec. 260, 193 Pac. 611. And see *Kalkmann v. Baylis*, 17 Cal. 291 (holding that important variation of plan of work done under building contract did not vary the contract as to payment, either as to time or mode).

12. *Holzheiser v. Hayes*, 133 Cal. 456, 65 Pac. 968.

13. *Perkins v. Ophir Silver Mining Co.*, 35 Cal. 11 (construing contract to receive and forward freight).

14. *Donlon v. Meyer*, 35 Cal. App. 225, 169 Pac. 447, per Lennon, J.

evidence would disclose a variance between the allegation and the proof. But in such case the contract may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion.¹⁵ Seemingly in contravention to the general rule, where a building contract, in addition to authorizing certain changes, expressly provided that "the same shall in no way affect or make void this contract . . . and this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever may be the nature and extent thereof," it was held that it was proper for the owner, in an action upon the contractor's bond to recover damages caused by the breach of the contract in failing to complete the building, to declare upon the original contract, without alleging such changes as were made in the work by the contractor prior to his abandonment thereof.¹⁶

§ 229. Merger.—As a general rule, all prior negotiations and stipulations concerning the subject matter of a contract are considered merged therein when the contract is executed, whether or not the law requires it to be written.¹⁷ But this rule cannot be said to apply to all contracts between the parties, even though the different contracts concern the same subject matter. A security for an obligation is not merged in another security of the same degree which is accepted for the same obligation.¹⁸ It

15. *Daley v. Russ*, 86 Cal. 114, 24 Cal. App. 228, 107 Pac. 150. See *Pac.* 867; *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127; *White v. Soto*, 82 Cal. 654, 23 Pac. 210; *O'Connor v. Dingley*, 26 Cal. 11; *Reynolds v. Jourdan*, 6 Cal. 108; *Whiting v. Heslep*, 4 Cal. 327; *Naylor v. Adams*, 15 Cal. App. 548, 115 Pac. 335; *Boyd v. Bargagliotti*, 12

16. *Wolf v. Aetna Indemnity Co.*, 163 Cal. 597, 126 Pac. 470 (overruling *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576).

17. See *supra*, § 166.

18. *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828.

is a settled rule that, in the absence of an agreement to that effect, a promissory note is not paid by the execution of another note, but that the time for its payment is thereby merely suspended until the maturity of the new note.¹⁹ And where an oral agreement has been made and partially performed, a writing subsequently given as a mere acknowledgment or memorandum thereof, and containing nothing inconsistent therewith, does not operate to merge or supersede an express provision of the oral agreement not included in terms in the memorandum.²⁰ But an oral agreement by which one party was to use his services in obtaining the renewal of a ten-year lease, which was about to expire, in consideration of a monthly payment to be made to him during the renewed term, the desire being expressed for a new lease of ten years, was held to be merged in a written contract to pay him such compensation for a shorter term of three years, which was entered into prior to the delivery of a new lease therefor, which had been executed by the lessor and placed in his possession, and which he was under no obligation to deliver, unless such written contract was made.¹ So, too, it has been declared that where on the sale of a business the purchasers agree to assume and pay all indebtedness of the vendor contracted in or about the business, such agreement, rather than the original indebtedness of the vendor, constitutes the gist of an action by a creditor.²

19. *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828; *Seaboard Nat. Bank of San Francisco v. Belden*, 32 Cal. App. Dec. 282, 190 Pac. 1045 (holding action properly brought on original obligation). See *NEGOTIABLE INSTRUMENTS*.

20. *Carpenter v. Hathaway*, 87 Cal. 434, 25 Pac. 549.

1. *Ryer v. Oesting*, 119 Cal. 564, 51 Pac. 857. See, also, *Youngberg v. South End Warehouse Co.*, 177 Cal. 504, 171 Pac. 97, holding that

a written contract of employment by which a corporation agreed to pay the plaintiff one-fourth of its net income in consideration of services to be rendered by the plaintiff was extinguished by a later contract made between the same parties and a third person employed subsequently by the corporation.

2. *Sherwood & Sherwood v. Gill & Lutz*, 36 Cal. App. 707, 173 Pac. 171.

XI. RESCISSION OR ABANDONMENT.

§ 230. Rescission by Mutual Consent.—The rescission of a contract means the annulling or abrogation of it and the placing of the parties to it in statu quo.³ As the Civil Code provides, "A contract is extinguished by its rescission."⁴ A contract may be rescinded either wholly or in part by the mutual consent of the respective parties,⁵ at any stage of their performance, and each of the parties released from any further obligation on account thereof; and such abandonment may be by parol.⁶ This is true notwithstanding one of the parties may previously have waived his right to rescind.⁷ Upon a naked rescission of a contract without any agreement between the parties as to terms, the parties are entitled to be restored to their former position.⁸ Rescission implies restoration to the same situation and the same terms as existed

3. *Stratton v. California Land etc. Co.*, 86 Cal. 353, 24 Pac. 1065; *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124; *Hogan v. Anthony*, 34 Cal. App. Dec. 930, 198 Pac. 47.

4. Civ. Code, § 1688; *Simpson v. Applegate*, 75 Cal. 342, 17 Pac. 237; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737; *Montgomery v. Meyerstein*, 43 Cal. App. Dec. 532; *Head v. Solomon*, 41 Cal. App. 6, 181 Pac. 80; *Alchian v. MacDonald*, 40 Cal. App. 505, 181 Pac. 77.

5. Civ. Code, § 1689; *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Canney v. South Pacific Coast R. R. Co.*, 63 Cal. 501; *Hallidie v. Sutter St. R. R. Co.*, 63 Cal. 575; *McFadden v. O'Donnell*, 18 Cal. 160; *Arsenio v. Smith*, 33 Cal. App. Dec. 630, 194 Pac. 756; *Power & Irrigation Co. of Clear Lake v. Bank of Woodland*, 226 Fed. 698, 141 C. C. A. 454.

6. *Tompkins v. Davidow*, 27 Cal. App. 327, 149 Pac. 788.

Prior to the abolition of the distinction between sealed and unsealed instruments it was held that a parol agreement to rescind a contract under seal was good, if such parol agreement was executed; and that such an agreement might be presumed from the acts of the parties. *McDonald v. Mountain Lake Water Co.*, 4 Cal. 335; *Whiting v. Heslep*, 4 Cal. 327; *Beach v. Covillard*, 4 Cal. 315; *Green v. Wells*, 2 Cal. 594.

7. *Hogan v. Anthony*, 34 Cal. App. Dec. 930, 198 Pac. 47 (but holding evidence failed to show rescission by consent).

8. *Guame v. Sheets*, 181 Cal. 119, 183 Pac. 535; *Law Credit Co. v. Tibbitts*, 160 Cal. 626, 117 Pac. 772; *Hogan v. Anthony*, 34 Cal. App. Dec. 930, 198 Pac. 47; *Hay v. Casey*, 30 Cal. App. 570, 159 Pac. 726, 728.

when the contract was made. It requires the surrender of any consideration or advantage secured by either party.⁹

A rescission by consent may be implied from the acts of the parties.¹⁰ The giving of notice and the conduct of the parties thereafter may amount to rescission by their mutual consent.¹¹ Moreover, where a rescission on the part of one party is implied by his refusal to comply with the contract, and the other party acquiesces therein, a rescission by consent is effected.¹² And, as provided by the Civil Code,

“The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act.”¹³

9. *List v. Moore*, 20 Cal. App. 616, 129 Pac. 962.

When a sale or exchange is honestly and fairly made, and perfected by a transfer of the title, so that the property in the article sold or exchanged is completely changed, an agreement of the parties thereafter made to rescind the contract, or to give up the bargain, as it often is expressed, amounts to no more than an executory agreement to resell or re-exchange, unless it shall appear that it was the intention of the parties that the rescission alone should operate as a completely executed contract of resale or of re-exchange. If such intention does not appear, then whatever was necessary in the first instance to constitute the original sale or exchange a legal transfer of the property is equally necessary to effect the resale or re-exchange. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

10. *Hogan v. Anthony*, 40 Cal. App. 679, 182 Pac. 52 (sale of truck); *Tompkins v. Davidow*, 27

Cal. App. 327, 149 Pac. 788; *Sarnighausen v. Scannell*, 11 Cal. App. 652, 106 Pac. 117. See, also, *Phillips v. Stark*, 62 Cal. Dec. 35, 199 Pac. 509 (holding evidence failed to show rescission by mutual consent).

11. *Newell v. E. B. & A. L. Stone Co.*, 181 Cal. 385, 184 Pac. 659; *D. Ghiradelli & Co. v. Students' Express & T. Co.*, 175 Cal. 427, 166 Pac. 16.

12. *Mettler v. Vance*, 30 Cal. App. 499, 158 Pac. 1044; *Carter v. Fox*, 11 Cal. App. 67, 103 Pac. 910.

13. Civ. Code, § 1699; *Blair v. Brownstone Oil etc. Co.*, 168 Cal. 632, 143 Pac. 1022; *Id.*, 17 Cal. App. 471, 120 Pac. 41 (unauthorized cancellation of contract by officers of corporation); *Brook v. Pearson*, 87 Cal. 581, 25 Pac. 963 (destruction of document operating as assignment); *Rothwell v. Vaughn*, 33 Cal. App. Dec. 260, 193 Pac. 611 (holding that only contract of employment was canceled and that covenant not to engage in business contained in separate instrument was not affected).

The bringing of an action to foreclose the rights of a purchaser under a contract for the sale of realty does not, however, operate as a rescission or entitle the purchaser to a return of the money paid.¹⁴

When there is no time limit on a contract, either party, ordinarily, may terminate the same, and thereafter incur no obligations.¹⁵ This principle is applicable in all cases where the contract is properly classified as an agreement to buy and sell personal property. It does not apply, however, to a case where the contract creates an easement or servitude in real property.¹⁶

In order that a rescission by mutual consent be effective, it must be made by the parties themselves or by their properly authorized agents.¹⁷ And it should be supported by a consideration. A mutual oral agreement is, however, a sufficient consideration for the cancellation of a written contract. And parol evidence of a mutual rescission is admissible.¹⁸

§ 231. Option to Rescind.—The assent of both parties to a rescission is sometimes expressed in the original contract, as where an option to rescind is given.¹⁹ In cases where a purchaser pays the price, but stipulates that he may, if he so desires, return the property and receive back the price paid, such stipulation is usually held not to be a contract of purchase, but for the exercise of an option of rescission, and the title upon the exercise of the option at once vests in the original vendor.²⁰ When the terms of the agreement do not limit the time within which an option to rescind may be exercised, the law implies that

14. *Southern Pac. R. R. Co. v. Valley Water Co.*, 173 Cal. 291, Allen, 112 Cal. 455, 44 Pac. 796. See L. R. A. 1917E, 680, 159 Pac. 865.
VENDOR AND PURCHASER.

15. *Southern Pac. Co. v. Spring Valley Water Co.*, 173 Cal. 291, L. R. A. 1917E, 680, 159 Pac. 865; *Randolph v. Lindsay*, 158 Cal. 727, 112 Pac. 300.

16. *Southern Pac. Co. v. Spring* 12 Cal. App. 645, 108 Pac. 145.

17. *Blair v. Brownstone Oil etc. Co.*, 17 Cal. App. 471, 120 Pac. 41.

18. *Hooke v. Great Western Lumber Co.*, 36 Cal. App. Dec. 506.

19. 6 *Ruling Case Law*, p. 922.

20. *George J. Birkel Co. v. Howze*,

it is to be performed within a reasonable time.¹ When the facts are undisputed, the question of reasonableness of time is for the court; but when the court, at the request of both parties, submits this question to the jury, neither party is in a position to question such action or the support of the implied finding that the contract was rescinded within a reasonable time, in the absence of any showing that the delay was unreasonable.²

§ 232. Rescission by One Party.—It is obvious that one party to a contract cannot rescind at his pleasure.³ However, it does not require the mutual consent of the parties to rescind in all cases.⁴ One party may rescind for one or more of the causes enumerated in section 1689 of the Civil Code.⁵ Section 1691 prescribes the mode of rescission under such circumstances.⁶ This section provides:

“Rescission, when not affected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and, 2. He must restore to the other

1. *Hernan v. Our Lady's Home*, 32 Cal. App. 318, 162 Pac. 901 (contract for purchase of life membership in home); *Spaeth v. Ocean Park etc. Inv. Co.*, 16 Cal. App. 329, 116 Pac. 980.

2. *Spaeth v. Ocean Park etc. Inv. Co.*, 16 Cal. App. 329, 116 Pac. 980.

3. *Rosenheim v. Howze*, 179 Cal. 309, 176 Pac. 456; *Sausalito etc. Co. v. Sausalito Imp. Co.*, 166 Cal. 302, 136 Pac. 57; *Swanston v. Clark*, 153 Cal. 300, 95 Pac. 1117; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820 (decision of department in same case reported in 2 Cal. Unrep. 491, 7 Pac. 481, not sustained); *Mc-*

Laughlin v. McLaughlin, 17 Cal. App. 699, 121 Pac. 704.

4. *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707.

5. *Swanston v. Clark*, 153 Cal. 300, 95 Pac. 1117. See *infra*, §§ 234-236. See, also, SALES; VENDOR AND PURCHASER.

6. *Deasy v. Taylor*, 39 Cal. App. 235, 178 Pac. 538; *Harron, Rickard & McCone v. Sisk*, 19 Cal. App. 628, 127 Pac. 355. And see *Hyman v. Harbor View Land Co.*, 31 Cal. App. Dec. 484, 188 Pac. 828 (holding no rescission effected by defendant).

party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."⁷

The requirement to "rescind promptly" obviously implies some notice to the other party of the determination to extinguish the contract.⁸ Notice of rescission may be waived by the other party, however,⁹ and in some instances the bringing of suit to enforce a rescission and recover benefits conferred is a sufficient notice.¹⁰ The failure to exercise a right of rescission promptly operates as a waiver of such right.¹¹

7. *Garcia v. California Truck Co.*, 183 Cal. 767, 192 Pac. 708 (release of claim for damages for personal injuries); *Ferguson v. Edgar*, 178 Cal. 17, 171 Pac. 1061 (lease with option to purchase); *Estate of Warner*, 168 Cal. 771, 145 Pac. 504 (antenuptial agreement); *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283 (sale of land); *Southern Pacific R. Co. v. Choate*, 132 Cal. 278, 64 Pac. 292 (sale of land); *Harrington v. Paterson*, 124 Cal. 542, 57 Pac. 476 (sale of realty); *Henderson v. Hicks*, 58 Cal. 364 (holding rescission valid); *Cohn v. Harada*, 35 Cal. App. 5, 168 Pac. 1151 (sale of horses); *Harron, Rickard & McCone v. Sisk*, 19 Cal. App. 628, 127 Pac. 355 (sale of engine); *Knight v. Bentel*, 39 Cal. App. 502, 179 Pac. 406 (holding requirements of section 1691 complied with); *Schweikert v. Seavey*, 6 Cal. Unrep. 554, 62 Pac. 600 (lease). See, also, the following cases decided prior to the adoption of the codes, and supporting these principles: *Bohall v. Diller*, 41 Cal. 532; *Barfield v. Price*, 40 Cal. 535; *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124.

See CANCELLATION OF INSTRUMENTS, vol. 4, p. 763 et seq., for detailed discussion of prerequisites to action for rescission of contract.

8. *McCue v. Bommel*, 148 Cal. 539, 83 Pac. 1000. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 763.

9. *Payne v. Neuval*, 155 Cal. 46, 99 Pac. 476.

10. See **VENDOR AND PURCHASER**.

11. *Wilson v. Beazley*, 62 Cal. Dec. 78, 199 Pac. 772; *Id.*, 32 Cal. App. Dec. 743; *Ferguson v. Edgar*, 178 Cal. 17, 171 Pac. 1061; *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805; *Estate of Warner*, 168 Cal. 771, 145 Pac. 504; *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283; *North Alaska Salmon Co. v. Hobbs, Wall & Co.*, 159 Cal. 380, 35 L. R. A. (N. S.) 501, 113 Pac. 870, 120 Pac. 27; *Kornblum v. Arthurs*, 154 Cal. 246, 97 Pac. 420; *Stephens v. Weyl-Zuckerman & Co.*, 33 Cal. App. 566, 165 Pac. 975; *Bernard v. Sloan*, 2 Cal. App. 737, 84 Pac. 232. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 800. See **FRAUD AND DECEIT** as to waiver of right to rescind contract on ground of fraud.

Conceding that before one party can rescind, he must place the other in statu quo,¹² and that an inability to restore precludes a rescission,¹³ such rule has no application where the rescinding party has received nothing which he can restore.¹⁴ And there is no obligation to return a consideration which is of no value whatever.¹⁵ Nor need a person seeking to rescind a contract return things which are not properly a part of the consideration,¹⁶ and which he is entitled to in any event.¹⁷

An offer to restore, whether accepted or not, taken in connection with prompt and proper notice to the other party of an intention to rescind, makes the rescission complete, and entitles the rescinding party to the aid of a court in securing to him the results and fruits of the rescission, which are the restoration of the moneys and things of value which form the consideration for the agreement.¹⁸ On the other hand, where one party has declared a rescission, the other may maintain an action to recover benefits

12. *Crouch v. Wilson*, 183 Cal. 576, 191 Pac. 916 (sale of stallion); *Beckwith v. Sheldon*, 165 Cal. 319, 131 Pac. 1049; *Estate of Yoell*, 164 Cal. 540, 129 Pac. 999; *Sample v. Fresno Flume & Irr. Co.*, 129 Cal. 222, 61 Pac. 1085; *Rohrbacher v. Kleebauer*, 119 Cal. 260, 51 Pac. 341; *San Diego etc. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 41 Pac. 333; *Fountain v. Semi-Tropic Land & W. Co.*, 99 Cal. 677, 34 Pac. 497; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249, 681; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 764 et seq.

13. *Wilson v. Beazley*, 62 Cal. Dec. 78, 199 Pac. 972; *Lupton v. Domestic Utilities Mfg. Co.*, 173 Cal. 415, 160 Pac. 241.

14. *Vulcan Fire Ins. Co. v. Jorgensen*, 33 Cal. App. 763, 166 Pac.

836; *Nettler v. Vance*, 30 Cal. App. 499, 158 Pac. 1044; *Harlan v. Gladding, McBean & Co.*, 7 Cal. App. 49, 93 Pac. 400.

15. Civ. Code, § 1691, subd. 2; *Russ Lumber & Mill Co. v. Muscupiabe Land etc. Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Gifford v. Carvill*, 29 Cal. 589; *Newark Trust Co. v. Kriebel*, 33 Cal. App. Dec. 356, 193 Pac. 962; *Deasy v. Taylor*, 39 Cal. App. 235, 178 Pac. 538; *Carter v. Fox*, 11 Cal. App. 67, 103 Pac. 910.

16. *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755.

17. *Richards v. Fraser*, 122 Cal. 456, 55 Pac. 246; *Mitchell v. Samuels*, 39 Cal. App. 134, 178 Pac. 336.

18. *Brown v. National Electric Works*, 168 Cal. 336, 143 Pac. 606; *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707; *Winkler v. Jerrue*, 20 Cal. App. 555, 129 Pac. 804.

conferred by him, even though he be in default, allowance being made for actual damages suffered by the rescinding party.¹⁹

The principles of rescission have no application where no enforceable contract exists. This is true whether there is merely a lack of mutuality of consent,²⁰ or, the parties having agreed, the contract is void as against public policy.¹ Courts of equity are as much bound by the law as courts of law, and neither may with impunity set aside or annul contracts made in strict compliance therewith.²

§ 233. Results of Election to Rescind.—Upon the breach of a contract a party thereto may treat it as rescinded, and if he has advanced money on it, bring an action for its recovery; or he may treat the contract as still in force and maintain an action for damages for the breach, but he cannot pursue both courses.³ If the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by breach of the covenants.⁴ This rule applies, of course, where a party has been defrauded, as well as when any other ground for rescission exists.⁵ But, while it is true that a party induced to enter into a transaction by fraud affirms the

19. *Heilig v. Parlin*, 134 Cal. 99, 66 Pac. 186; *Shively v. Semi-Tropic Land etc. Co.*, 99 Cal. 259, 33 Pac. 848; *Burmester v. Horn*, 35 Cal. App. 549, 170 Pac. 674. See *VENDOR AND PURCHASER*.

20. *Hardison v. Davis*, 131 Cal. 635, 63 Pac. 1005.

1. *Martin v. Wade*, 37 Cal. 168. See as to public policy, *supra*, § 70 et seq.

2. *Boyce v. Fisk*, 110 Cal. 107, 42 Pac. 473. See *CANCELLATION OF INSTRUMENTS*, vol. 4, p. 756.

3. *Lemle v. Barry*, 181 Cal. 1, 183 Pac. 150; *House v. Piercy*, 181 Cal. 247, 183 Pac. 807 (citing authorities). See *DAMAGES; ELECTION OF REMEDIES; SALES; VENDOR AND PURCHASER*.

4. *House v. Piercy*, 181 Cal. 247, 183 Pac. 807.

5. *Conlin v. Studebaker Bros. Co.*, 175 Cal. 395, 165 Pac. 1009; *Fulmele v. Los Angeles Inv. Co.*, 34 Cal. App. Dec. 533, 196 Pac. 923. See *FRAUD AND DECEIT*.

transaction when he brings an action for damages, and because of the affirmance loses any right to disaffirm subsequently, it is not true that if he seeks to disaffirm, but does so ineffectually, he loses the right thereafter to maintain an action for damages. The right to damages exists unless and until the transaction is effectually disaffirmed.⁶ It is fundamental that where the rights of others have intervened and circumstances have so far changed that rescission may not be decreed without injury to them, rescission will be denied and the complaining party left to his other remedies.⁷

§ 234. Grounds for Rescission in General.—In some jurisdictions rescission is not allowed except for fraud, and, in others, a distinction is made between executed and executory contracts. In California the statute designates the grounds for rescission.⁸ Certain of these grounds are specified in section 1689 of the Civil Code.⁹ Subdivision 1 of this section provides that a rescission may be had “if the consent of the party rescinding or of any party jointly contracting with him, was given by mistake,¹⁰ or

6. *Bancroft v. Woodward*, 183 Cal. 99, 190 Pac. 445, per Olney, J.

7. *Beckwith v. Sheldon*, 165 Cal. 319, 131 Pac. 1049; *Meyers v. Merilion*, 118 Cal. 352, 50 Pac. 662.

8. Civ. Code, §§ 1689, 2580, 3406, 3414; *Joshua Hendy Machine Works v. American Steam-Boiler Ins. Co.*, 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018; *Harron, Rickard & McCone v. Sisk*, 19 Cal. App. 628, 127 Pac. 355.

And the right is given to rescind contracts of insurance for certain reasons. Civ. Code, §§ 2610, 2619; *Joshua Hendy Machine Works v. American etc. Ins. Co.*, 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018. See **INSURANCE**.

9. *Peardon v. Marley*, 33 Cal. App. Dec. 723, 195 Pac. 70. See *infra*, § 235, as to failure of consideration, and § 236 as to default in performance as grounds for rescission.

10. *Steinhart v. National Bank of D. O. Mills*, 94 Cal. 362, 28 Am. St. Rep. 132, 29 Pac. 717; *Pacific Portland Cement Co. Consolidated v. Placer County Land Co.*, 34 Cal. App. Dec. 33; *Horne v. Hughes*, 19 Cal. App. 6, 124 Pac. 736; *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484 (mistake of law).

See **CANCELLATION OF INSTRUMENTS**, vol. 4, p. 783. And see *supra*, § 46 et seq., as to mistake as affecting reality of consent.

obtained through duress,¹¹ fraud,¹² or undue influence,¹³ exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." Section 3604 of the Civil Code provides:

"The rescission of a written contract may be adjudged, on the application of a party aggrieved: 1. In any of the cases mentioned in section sixteen hundred and eighty-nine; or, 2. Where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault; or, 3. When the public interest will be prejudiced by permitting it to stand."¹⁴

But "Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made."¹⁵ Nor does the fact that a party may have mistaken his rights under a contract operate as a rescission on his part, when it is manifest that he did not contemplate anything of the kind.¹⁶

The sections of the Civil Code dealing with lack of reality of consent as a ground for the rescission of a contract, namely, sections 1565, 1566, 1567 and 1568, seem to establish the rule beyond all controversy that a contract cannot be rescinded when it appears that consent would have been given and the contract entered into notwithstanding the duress, menace, fraud, undue influence, or mistake relied upon.¹⁷ The express reservation of a right

11. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 777. See *supra*, §§ 37, 38, as to duress as affecting reality of consent.

12. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 770; FRAUD AND DECEIT. As to rescission of contracts of subscription for stock of corporation for fraud, see CORPORATIONS, §§ 176-180.

13. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 777.

See *supra*, §§ 40-45, as to undue

influence as affecting reality of consent.

14. See *supra*, § 105 et seq., as to enforceability of illegal contracts.

15. Civ. Code, § 3407. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 783.

16. *Miller v. Steen*, 34 Cal. 138; *Hogan v. Anthony*, 34 Cal. App. Dec. 930, 198 Pac. 47.

17. *Greenawalt v. Rogers*, 151 Cal. 630, 91 Pac. 526.

to rescind for a specified ground cannot be construed as a waiver of other grounds of rescission.¹⁸ Moreover, if a party has a right to rescission his motive is an immaterial matter,¹⁹ and it is proper for the court to exclude evidence bearing on the question of his motive.²⁰

§ 235. Failure of Consideration.—Subdivision 2 of section 1689 of the Civil Code provides in general terms that a party to a contract may rescind the same when, through the fault of the other party, the consideration fails in whole or in part.¹ But since the rule is ordinarily stated to be that where a contract is entire there is a right of rescission for partial failure of consideration under section 1689 of the Civil Code,² it would seem that a partial failure, only, of the consideration supporting a severable contract does not authorize the rescission of the whole, but that in so far as the valid consideration extends to the severable portions, they must stand obligatory upon the parties.³

Subdivision 3 of section 1689 of the Civil Code permits a rescission of a contract by a party thereto, if the con-

18. *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951.

19. *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755; *Crim v. Umbsen*, 155 Cal. 497, 132 Am. St. Rep. 127, 103 Pac. 178.

20. *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755.

1. *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 186 Pac. 356; *Blahnik v. Small Farms Improvement Co.*, 181 Cal. 379, 184 Pac. 661 (breach of covenant of vendor of realty); *Brown v. National Electric Works*, 168 Cal. 336, 143 Pac. 606; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737 (failure of title); *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71 (sale of automobile); *Mettler v. Vance*, 30 Cal. App. 499, 158 Pac. 1044 (sale

of automobile); *Harron, Rickard & McCone v. Sisk*, 19 Cal. App. 628, 127 Pac. 355 (breach of express warranty in sale of personal property); *Bernard v. Sloan*, 2 Cal. App. 737, 84 Pac. 232. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 785; SALES; VENDOR AND PURCHASER.

2. *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305; *Howlin v. Castro*, 136 Cal. 605, 69 Pac. 432; *Richter v. Union Land etc. Co.*, 129 Cal. 367, 62 Pac. 39; *Fontaine v. Lacassie*, 36 Cal. App. 175, 171 Pac. 812; *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820.

3. *Quill v. Jacoby*, 4 Cal. Unrep. 736, 37 Pac. 524. And see CANCELLATION OF INSTRUMENTS, vol. 4, p. 785.

sideration becomes entirely void from any cause,⁴ and subdivision 4 "if such consideration before it is rendered to him fails in a material respect from any cause."⁵ The latter provision is not to be interpreted in such a manner that the words "material respect" shall be held to refer to something going to the root of the contract—something which is of its essence and the essence of which would destroy, for a party wishing to rescind, the whole purpose of the agreement. Nor is it to be regarded as inconsistent with subdivision 2. The words "before it is rendered to him" contained in subdivision 4 indicate the difference in the scope of the two subdivisions, the latter being strictly limited to executory contracts.⁶ A total failure of consideration makes it unnecessary to give notice of rescission before bringing an action.⁷

It may be observed in this connection that one may lawfully agree to sell either personal or real property to which at the time he has no title, and the want of title furnishes no ground for rescission unless, upon tender, defendant is unable to comply with the agreement.⁸

§ 236. Default in Performance.—It is frequently declared that the refusal or failure of one party fully to perform his part of the contract constitutes a partial fail-

4. Pacific Portland Cement Co. Consolidated v. Placer County Land Co., 34 Cal. App. Dec. 33; Horne v. Hughes, 19 Cal. App. 6, 124 Pac. 736.

5. Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 Pac. 356; Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755; Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253 (holding provision inapplicable).

6. Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755.

7. San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 Pac. 325; McDonald v. Pacific Debenture Co.,

146 Cal. 667, 80 Pac. 1090; Field v. Austin, 131 Cal. 379, 63 Pac. 692; Richter v. Union Land etc. Co., 129 Cal. 367, 62 Pac. 39; Russ Lumber etc. Co. v. Muscupiabe Land etc. Co., 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; Shull v. Crawford, 33 Cal. App. 36, 164 Pac. 330; Glass v. Glass, 4 Cal. App. 604, 88 Pac. 734. See CANCELLATION OF INSTRUMENTS, vol. 4, p. 763, for full discussion of notice as condition precedent to bringing action for rescission.

8. Maloney v. Houston, 34 Cal. App. Dec. 654, 197 Pac. 661. See SALES; VENDOR AND PURCHASER.

ure of consideration, which, under section 1689 of the Civil Code, gives the other party a right to rescind.⁹ And it has been held that the showing of a clear intention by one party to violate the provisions of a contract justifies a rescission.¹⁰ In such cases, however, the question properly arises as to whether there is such a breach as will warrant a rescission.¹¹ Where the breach is but partial¹² and of minor importance, not going to the root of the contract and one that can be readily compensated in damages, the party injured cannot rescind, but must perform his part and seek compensation in damages.¹³ If, how-

9. *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951 (manufacture of lumber); *Brown v. National Electric Works*, 168 Cal. 336, 143 Pac. 606 (employment); *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671 (sale of lumber); *American-Hawaiian Engineering etc. Co. v. Butler*, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280 (building contract); *Hart v. Buckley*, 164 Cal. 160, 128 Pac. 29 (employment of architect); *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755 (purchase of realty); *Fairechild etc. Co. v. Southern Refining Co.*, 158 Cal. 264, 110 Pac. 951 (sale of asphalt); *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29 (building contract); *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55 (sale of oil); *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 Pac. 86 (employment); *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305 (sale of oranges); *McDonald v. Pacific Debenture Co.*, 146 Cal. 667, 80 Pac. 1090 (payment of money); *Davidson v. Laughlin*, 138 Cal. 320, 5 L. R. A. (N. S.) 579, 71 Pac. 345; *Richter v. Union Land and Stock Co.*, 129 Cal. 367, 62 Pac. 39 (deed of water right); *Osborn v. Henry*

Cowell Lime etc. Co., 37 Cal. App. 67, 173 Pac. 492 (refusal to execute lease). See CANCELLATION OF INSTRUMENTS, vol. 4, p. 785.

10. *Minaker v. California Canneries Co.*, 138 Cal. 239, 71 Pac. 110; *Jensen v. Goss*, 39 Cal. App. 427, 179 Pac. 225.

11. *National Pacific Oil Co. v. Watson*, 60 Cal. Dec. 495, 193 Pac. 133 (sale of land); *Fountain v. Semi-Tropic Land & W. Co.*, 99 Cal. 677, 34 Pac. 497 (insufficient case for rescission of contract for sale of real estate); *Grotheer v. Panama-Pacific Land Co.*, 41 Cal. App. 19, 181 Pac. 667; *Albert v. Albert*, 12 Cal. App. 268, 107 Pac. 156 (holding rescission not warranted).

12. *State v. McCauley*, 15 Cal. 429; *Quill v. Jacoby*, 4 Cal. Unrep. 736, 37 Pac. 524.

13. *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 186 Pac. 356; *Withers v. Moore*, 140 Cal. 591, 74 Pac. 159; *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Fountain v. Semi-Tropic Land & W. Co.*, 99 Cal. 677, 34 Pac. 497 (insufficient case for rescission of contract for sale of real estate); *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371.

ever, the breach be of a condition, the nonperformance of which will render it impossible for the other party to perform, or will frustrate the whole purpose of the contract on his part, he may rescind, provided performance has not proceeded so far that it is impossible to place the opposite party nearly in the position he was in before the contract was entered into.¹⁴ Whether the breach, if there was any, was so material as to justify plaintiffs in abandoning performance is to some extent a question of fact,¹⁵ depending upon the circumstances of the case.¹⁶ Failure to make installment payments when due authorizes a rescission of a contract.¹⁷

The general rule stated above is also subject to the qualification that the right to rescind rests only with the party who is without default. One party cannot violate the contract himself, and then seek a rescission on the ground that the other party has followed his example.¹⁸

14. *Withers v. Moore*, 140 Cal. 591, 74 Pac. 159; *Fountain v. Semi-Tropic Land & W. Co.*, 99 Cal. 677, 34 Pac. 497 (insufficient case for rescission of contract for sale of real estate); *Mettler v. Vance*, 30 Cal. App. 499, 158 Pac. 1044.

15. *Fountain v. Semi-Tropic Land & W. Co.*, 99 Cal. 677, 34 Pac. 497 (insufficient case for rescission of contract for sale of real estate).

16. *American Type etc. Co. v. Packer*, 130 Cal. 459, 62 Pac. 744.

17. *American-Hawaiian Engineering etc. Co. v. Butler*, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280; *Fairechild-Gilmore-Wilton Co. v. Southern Refining Co.*, 158 Cal. 264, 110 Pac. 951 (holding failure to pay installments on contract for furnishing materials due each month gave creditor right to rescind contract); *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29; *San Francisco Bridge Co. v. Dumbarton Land etc. Co.*, 119 Cal. 272, 51 Pac. 335; *Golden Gate Lum-*

ber Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635; *Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 514; *Beek v. Schmidt*, 13 Cal. App. 448, 110 Pac. 455; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Jensen v. Goss*, 39 Cal. App. 427, 179 Pac. 225. See SALES; *VENDOR AND PURCHASER*.

18. *North American Dredging Co. v. Outer Harbor etc. Co.*, 178 Cal. 406, 173 Pac. 756; *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671; *American-Hawaiian Engineering etc. Co. v. Butler*, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280; *Fairechild etc. Co. v. Southern Refining Co.*, 158 Cal. 264, 110 Pac. 951; *San Francisco Bridge Co. v. Dumbarton Land etc. Co.*, 119 Cal. 272, 51 Pac. 335; *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635; *State v. McCauley*, 15 Cal. 429; *Ross v. Tabor*, 35 Cal. App. Dec.

But this latter rule is likewise subject to some qualifications. Commenting upon the subject, the court declared in a recent case:

“Where the respective obligations upon which each party is in default are dependent and concurrent, the justice and necessity of the rule is obvious. So, also, in cases where the rescinding party’s default is so related to the obligation in which the other party has failed that it in some manner affects the performance thereof, or the duty of the other party to perform, the rule is plainly applicable. But no case applies this rule to a delinquency of the rescinding party which has no relation to the obligation of the other party, in respect of which the right of rescission is claimed, and which does not excuse, prevent, or interfere with his performance of that obligation, or affect or impair his duty to perform it. It is well understood that this rule does not apply to all derelictions by the complaining party, but only to a delinquency connected with the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction.”¹⁹

And of course this principle cannot be given application to a case in which a clause in the contract is void as an attempted interference with the power and jurisdiction of the courts to decide controversies between parties.²⁰

726, 200 Pac. 971. And see *Gray v. Bonnell*, 19 Cal. App. 243, 125 Pac. 355 (holding that who is estopped to deny the performance of a contract cannot claim a rescission thereof on the ground of nonfulfillment).

19. *American-Hawaiian Engineering etc. Co. v. Butler*, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280, per *Shaw, J.* (construing provisions

of building contract with reference to rescission).

20. *North American Dredging Co. v. Outer Harbor etc. Co.*, 178 Cal. 406, 173 Pac. 756; *Old Saucelito Land etc. Co. v. Commercial Union Assur. Co.*, 66 Cal. 253, 5 Pac. 232; *Loup v. California S. R. R. Co.*, 63 Cal. 97; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54.

XII. PERFORMANCE AND BREACH.

Generally.

§ 237. **Obligation to Perform.**—The moment a contract is made, a right is vested in each party to have it remain unaltered and to have it performed.¹ It is not necessary that one party inform the other that he will hold the latter bound by the terms of the agreement. Such a notice adds nothing to the obligations of the contract itself.² Either party has a right to insist strictly on the contract, and his motives or good faith in so doing are immaterial, and cannot be inquired into.³ Public policy is subserved by leaving the parties and their rights to be measured by the terms of their engagements.⁴ But each party must fulfill or offer to perform every condition precedent, and be prepared or offer to fulfill every condition concurrent, imposed upon him, before he can demand or require performance from the other, except where such other party has given notice that he will not comply with his part of the contract.⁵ The acceptance and retention of the bene-

1. *Stohr v. San Francisco Musical Fund Society*, 82 Cal. 557, 22 Pac. 1125; *Withers v. Bousfield*, 42 Cal. App. 304, 183 Pac. 855 (citing Code Civ. Proc., § 1962, subd. 2).

2. *Jewell v. Gomez*, 30 Cal. App. Dec. 615, 186 Pac. 384.

3. *National etc. Mfg. Co. v. Producers' Ref. Co.*, 169 Cal. 740, 147 Pac. 963; *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147.

4. *California Cured Fruit Assn. v. Stelling*, 141 Cal. 713, 75 Pac. 320.

5. Civ. Code, §§ 1439, 1440; *Cameron v. Burnham*, 146 Cal. 580, 80 Pac. 929; *Peasley v. Hart*, 65 Cal. 522, 4 Pac. 537; *Howard v. Galbraith*, 13 Cal. App. 373, 109 Pac. 889; *Bristol v. Hershey*, 7 Cal. App.

738, 95 Pac. 1040. And see *infra*, § 239.

But see *Hullinger v. Big Sespe Oil Co.*, 61 Cal. Dec. 70, 194 Pac. 742, where the supreme court in bank denying a hearing after judgment in the district court of appeal (33 Cal. App. Dec. 506), said: "We do not approve those portions of the opinion which declare that it is essential for a plaintiff in an action for damages on the contract, whereby the contract is affirmed, to allege or prove his willingness and ability to perform the contract according to its terms."

Undoubtedly the court means that it is not necessary for a plaintiff to allege and show a willingness and ability to completely perform

fits of a transaction clearly bind a party to comply with terms upon which benefits were bestowed.⁶ It is to be noted that, in the absence of anything to the contrary in a contract which has been concluded by an election to exercise an option to purchase, the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property under which the agreement or covenant of the vendor to convey and the vendee to pay the purchase price are considered mutual and dependent covenants and are to be performed contemporaneously by the respective parties.⁷ Under the rule embodied in section 3529 of the Civil Code, "That which ought to be done is to be regarded as done, in favor of him to whom and against him from whom, performance is due."⁸

It is obvious, however, that a person cannot be compelled to perform a contract essentially different from that made.⁹ His liability is limited by the terms as expressed.¹⁰ Thus, where the liability of a person is limited to payment from a particular and special fund, if such fund does not exist, no payment can be enforced.¹¹

his part of the contract, and does not mean to contradict the rule stated in the text above.

See *infra*, § 274, as to repudiation of contract.

6. *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3; *Northern Assur. Co. v. Stout*, 16 Cal. App. 548, 117 Pac. 617.

See *supra*, § 34, as to retention benefits as acceptance of offer.

7. *Flickenger v. Heck*, 62 Cal. Dec. 377, 200 Pac. 1045; *Cates v. McNeil*, 169 Cal. 697, 147 Pac. 944. See VENDOR AND PURCHASER.

8. *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379.

9. *Congdon v. Chapman*, 63 Cal. 357.

10. *Woodard v. Glenwood Lumber Co.*, 174 Cal. 568, 163 Pac. 1017 (lumbering contract); *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983 (holding subcontractor not bound by provisions in main contract between contractor and owner except to the extent that he had agreed to perform his work according to specifications contained therein); *Globe Oil Mills v. Van Camp Sea Food Co.*, 35 Cal. App. Dec. 250, 199 Pac. 864; *Royal Ins. Co. v. Caledonian Ins. Co.*, 20 Cal. App. 504, 129 Pac. 597; *Fireman's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 2 Cal. App. 690, 84 Pac. 253.

11. *Bagley v. Cohen*, 5 Cal. Unrep. 783, 50 Pac. 4.

It has been declared that a receiver of an insolvent irrigation company is not bound to perform its contracts, unless it appears to be to the interest of the creditors; but a demand upon such receiver to fulfill its contract for the supply of water is proper, as he is the only person who can perform such contract, and it would be to the interest of the creditors for him to deliver the water, if he had it.¹² All matters connected with performance are regulated by the law of the place where the contract by its terms is to be performed.¹³

§ 238. Alternative Stipulations.—A contract in the alternative, when not in terms providing otherwise, gives the right of election to the party on whom rests the obligation of performance.¹⁴ But the doctrine of election, it has been said, applies only to cases where the party, upon whom rests the obligation of performance, stands in the same position to both alternatives presented, and is bound to indicate his choice between them.¹⁵ As provided by section 1449 of the Civil Code,

“If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.”¹⁶

In this way only can the obligation become absolute and determinate. Thus, if a debtor, by a given day, is to pay money or furnish goods, it is evident that upon a failure to indicate which of the two he will do, the obligation

12. *Russ Lumber & Mill Co. v. Muscupiabe Land etc. Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995. See RECEIVERS.

13. *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, 157 Pac. 630. See CONFLICT OF LAWS, vol. 5, p. 450 et seq.

14. Civ. Code, § 1448; *Dittrich v. Gobey*, 119 Cal. 599, 51 Pac. 962.

15. *Norris v. Harris*, 15 Cal. 226.

16. *Rewrick v. Gladstone*, 48 Cal. 554; *Coalinga etc. Gas Co. v. Associated Oil Co.*, 16 Cal. App. 361, 116 Pac. 1107 (holding section 1449 applicable).

would be indefinite and uncertain.¹⁷ But this, it has been said, is quite different from a contract to do a certain thing absolutely by a given day, with the privilege of discharging the obligation in some other way previously. In such case, if the privilege be not exercised, the obligation is not left in uncertainty, but is definite and absolute.¹⁸ A further rule provided by the code is that

“The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party.”¹⁹

If an agreement is in the alternative and one of the alternatives becomes impossible or cannot be lawfully performed, the party so contracting is bound to perform the other, and the obligation is to be interpreted as if the other alternative stood alone.²⁰ In view of section 1448 of the Civil Code, where a contract calls for the delivery within a certain time on demand of either of two things, a demand for one thing only is insufficient, since it is incumbent upon the demanding party to make the demand in the alternative. Section 1449 of the Civil Code is inapplicable in such a case, since, until a proper demand is made, there is no right of rescission.¹ When a contract is not in the alternative, a party must perform or take the consequences of a breach.²

§ 239. Performance of Conditions.

“Before any party to an obligation can require another party to perform any act under it, he must fulfill all con-

17. *Norris v. Harris*, 15 Cal. 226. 804; *Irvine v. Postal Telegraph Cable Co.*, 37 Cal. App. 60, 173 Pac. 487.

18. *Norris v. Harris*, 15 Cal. 226; *Rehnert v. Beam*, 40 Cal. App. 264, 180 Pac. 622.

19. Civ. Code, § 1450; *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131 (alternative modes of payment).

20. Civ. Code, § 1451; *Rosenthal v. Perkins*, 123 Cal. 240, 55 Pac.

1. *Dozier v. National Borax Co.*, 35 Cal. App. 612, 170 Pac. 638.

2. *People v. Central Pac. R. R. Co.*, 76 Cal. 29, 18 Pac. 90.

ditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him or the like fulfillment by the other party, except as provided by the next section."³

This provision is equally applicable to obligations arising upon agreements for the sale of realty and of personalty, and the authorities both before and since the adoption of the codes recognize this fact.⁴ The general rule in respect to the performance of conditions precedent is, that they must be strictly performed, unless a performance has been prevented or waived by the other party, or has been prevented by the act of God. or a public enemy.⁵ It is well recognized that a failure to comply with conditions precedent not only will prevent an action by the defaulting party to enforce the contract,⁶ but also will sustain an action by the other party for a breach thereof.⁷ It is held that where there is a promise to pay out of a fund to be realized in a certain way, there is an implied

3. Civ. Code, § 1439; Bayly v. Lee, 174 Cal. 137, 162 Pac. 96 (employment of attorney); Capell v. Capell Sales Co., 165 Cal. 334, 132 Pac. 260 (holding agreement imposed neither condition concurrent upon grantor of patent rights); H. Hackfeld & Co. v. Castle, 33 Cal. App. Dec. 177, 61 Cal. Dec. 721, 198 Pac. 1041 (sale of honey); Bauer's Law & Collection Co. v. Harrell, 32 Cal. App. 45, 162 Pac. 125 (action on promissory notes); Wilfley v. New Standard Concentrator Co., 164 Fed. 421, 90 C. C. A. 543 (action by licensor under patent to recover royalties from licensee). And see *supra*, § 237.

4. Hanson v. Slaven, 98 Cal. 377, 33 Pac. 266. See SALES; VENDOR AND PURCHASER.

5. Pearson v. McKinney, 160 Cal. 649, 117 Pac. 919; Vassault v. Kirby, 1 Cal. Unrep. 668.

6. Pearson v. McKinney, 160 Cal. 649, 117 Pac. 919; Christensen v. Oram, 156 Cal. 633, 105 Pac. 950; Potts Drug Co. v. Benedict, 156 Cal. 322, 25 L. R. A. (N. S.) 609, 104 Pac. 432; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Sinnott v. Schumacher, 30 Cal. App. Dec. 897, 187 Pac. 105; Peatland Realty Co. v. Edwards, 23 Cal. App. 402, 138 Pac. 357; Burke v. Dittus, 8 Cal. App. 175, 96 Pac. 330.

7. Alderson v. Houston, 154 Cal. 1, 96 Pac. 884; San Francisco Bridge Co. v. Dumbarton etc. Imp. Co., 119 Cal. 272, 51 Pac. 335; Porter v. Arrowhead etc. Co., 100 Cal. 500, 35 Pac. 146; Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979; Woodruff Co. v. Exchange Realty Co., 21 Cal. App. 607, 132 Pac. 598; Beck v. Schmidt, 13 Cal. App. 448, 110 Pac. 455.

obligation to use reasonable diligence in performing the act upon which payment is contingent, and that, in default of such diligence, payment becomes due without performance of the condition.⁸ The performance of conditions precedent entitles a party to performance on the other part.⁹

If conditions are mutual and concurrent upon failure of either party to keep his agreement, the other is released from any legal or moral obligation to carry out his own promise or covenant.¹⁰ But it is evident from the terms of section 1439 of the Civil Code that in order that one party may place the other party in default upon a contract consisting of mutually dependent obligations, he must not only be able to perform, but must offer to perform.¹¹ Under some circumstances the failure of a party to enforce the performance of a condition precedent by the other party renders it concurrent with his own unperformed obligations, and he cannot, thereafter, without a tender or offer of performance, place such other party in default.¹²

The law abhors a forfeiture, and therefore will ordinarily be satisfied with a substantial compliance of a condition involving a forfeiture when its liberal fulfillment is prevented by uncontrollable circumstances.¹³

8. *Van Buskirk v. Kuhns*, 164 Cal. 472, Ann. Cas. 1914B, 932, 44 L. R. A. (N. S.) 710, 129 Pac. 587. See PAYMENT.

9. *Norton v. Norton's Estate*, 41 Cal. App. 614, 183 Pac. 214.

10. *Asels v. Asels*, 30 Cal. App. Dec. 187, 185 Pac. 419; *Harrison v. Turner*, 27 Cal. App. 423, 150 Pac. 395.

11. *Royal v. Dennison*, 109 Cal. 558, 42 Pac. 39 (decision of department in same case, reported in 4 Cal. Unrep. 851, 38 Pac. 39, not sustained); *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266; *Jensen v. Carlenzoli*, 36 Cal. App. Dec. 470.

VI Cal. Jur.—26

12. *Boone v. Templeman*, 158 Cal. 290, 130 Am. St. Rep. 126, 110 Pac. 947 (holding where vendor waived right to declare whole sum due for default of installment and allowed time for full payment to elapse, he could not then declare forfeiture without tender of deed and demand for full payment); *Russ Lumber & Mill Co. v. Muscupiabe Land etc. Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558.

13. *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512 (citing authorities). See FORFEITURES.

It is elementary that a party may waive the benefit of any conditions or provisions of a contract, made in his behalf, no matter in what manner they may have been made or secured.¹⁴ But the performance of conditions precedent must be averred in the complaint, either specifically or by authorized general averment, or a waiver thereof alleged.¹⁵) In an early case it was declared that where the declaration states a condition precedent, and fails to aver performance, the defect must be taken advantage of by demurrer in the trial court; that it is too late to urge such defect after verdict.¹⁶ Under some circumstances, the necessary effect of such a waiver is to bring about the event upon which rests the obligation of such party to perform.¹⁷ That the conditions of a contract in writing may be waived orally, it has been declared, "is too well established to require citation of authority."¹⁸

Mode of pleading performance of conditions.—It is provided in the code that in pleading the performance of conditions precedent in a contract it is not necessary to state the facts showing such performance, but it may be alleged generally that a party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial facts showing such performance.¹⁹

14. *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 601, 117 Pac. 767 (escrow agreement); *Needham v. Chandler*, 8 Cal. App. 124, 96 Pac. 325. See PLEADING.

15. *McNulty v. New Richmond Land Co.*, 30 Cal. App. Dec. 836, 187 Pac. 97; *California Canneries Co. v. Great Western Lumber Co.*, 30 Cal. App. Dec. 368, 185 Pac. 1008.

16. *Happe v. Stout*, 2 Cal. 460; *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 Pac. 740; *Rousseau v. Cohn*, 20 Cal. App. 469, 129

Pac. 618 (stipulation for acceptance in writing of plans and specifications prepared by architects). And see *supra*, § 216.

17. *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951 (contract to erect sawmill as soon as railroad was constructed).

18. *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 186 Pac. 356.

19. Code Civ. Proc., § 457; *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925 (holding requirements of section complied with).

§ 240. Demand for Performance.—The general principles in regard to the necessity of demand before suit are stated in another article.²⁰ Where a contract is for the delivery of something other than money, at a fixed time, no demand is necessary.¹ But where no time is specified for the doing of an act other than the payment of money, a demand for performance is necessary in order to put the promisor in default. As has been pointed out in another article, the reason for this rule is to give the promisor an opportunity to perform before being subjected to litigation.² And such demand should be made within a reasonable time,³ which always depends, of course, upon the circumstances. In determining this question where the contract is for the sale of property, and where there is no express provision fixing the time within which the conveyance is to be made, some consideration is to be given to the character of the property which is the subject of the contract, although the general rule is that whether time is of the essence of the contract is to be determined from the terms of the writing itself.⁴ If no cause for delay be shown, it has been said to be reasonable to require the demand to be made within the time limited by statute for bringing an action. There is the same reason for hastening the demand that there is for hastening the commencement of the action.⁵

20. See ACTIONS, vol. 1, p. 340 et seq.

1. *Marshall v. Ferguson*, 23 Cal. 65. See PAYMENT for discussion of necessity or demand before suit upon contract for payment of money.

2. *Tisdale v. Bryant*, 38 Cal. App. 750; 177 Pac. 510; *Caner v. Owners Realty Co.*, 33 Cal. App. 479, 165 Pac. 727. See ACTIONS, vol. 1, p. 341.

3. *Tisdale v. Bryant*, 38 Cal. App. 750, 177 Pac. 510. See, also, *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273, stating rule where actual demand is essential as condition

precedent to complete right of action for recovery of money. Quoted in *Flickinger v. Heck*, 62 Cal. Dec. 377, 200 Pac. 1045.

4. *Grotefend v. May*, 33 Cal. App. 321, 165 Pac. 27. See supra, §§ 211-214, for discussion of time as of essence of contract.

5. *Meherin v. San Francisco Produce Exchange*, 117 Cal. 215, 48 Pac. 1074; *Tisdale v. Bryant*, 38 Cal. App. 750, 177 Pac. 510. See, also, *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273, stating rule where actual demand is essential

The law does not require the performance of a useless act, and when it is made to appear by the defendant's own act that a demand would have been refused, then he cannot be heard to object that no demand was made.⁶ Furthermore, when a proper demand or its legal equivalent has been made by one party after the other is in default and performance refused, the former is relieved from any further obligation to make demand.⁷ Whenever it is essential to the cause of action that the plaintiff should have actually requested the defendant to perform his contract, such request must be stated in the complaint and proved.⁸ Where the complaint alleged that the defendants "failed and refused to furnish said water stock or any part thereof," it was held sufficient, since unless a request was made, no refusal could have taken place.⁹

In an action on a contract demand may not be made for a sum exceeding that which the contract calls for.¹⁰ If, however, the person offering to perform is acting in good faith, and makes the mistake of demanding something to which he is not entitled, he ought, it has been said, to be given the same opportunity to recede from such demand that he is allowed for tendering the correct amount where he has tendered too little, or the right thing when he has tendered the wrong thing. There is no consideration of justice or convenience that applies with any greater force to one case than to the other.¹¹

as condition precedent to complete right of action for recovery of money. Quoted in *Flickinger v. Heck*, 62 Cal. Dec. 377, 200 Pac. 1045.

6. *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355; *McGillivray Construction Co. v. Hoskins*, 36 Cal. App. Dec. 480. See *ACTIONS*, vol. 1, p. 343.

7. *Howard v. Galbraith*, 13 Cal. App. 373, 109 Pac. 889.

8. *California Canneries Co. v. Great Western Lumber Co.*, 30 Cal. App. Dec. 368, 185 Pac. 1008.

9. *Culver v. Miller*, 36 Cal. App. Dec. 401.

10. *Dyer v. Ryan*, 2 Cal. Unrep. 173.

11. *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115. See *infra*, § 241, as to tender or offer of performance; *Los Angeles Olive Growers' Assn. v. Pacific Surety Co.*, 24 Cal. App. 95, 140 Pac. 295 (holding complaint contained sufficient averment of compliance with condition).

§ 241. Tender or Offer—Essentials Generally.—Where one party may call for the performance of an agreement upon the part of another only by a tender or offer to perform his own agreement, there is no breach of the contract by the one until such offer or tender by the other.¹² The Civil Code defines what shall constitute such an offer to perform as will prevent the person making the offer from being in default in the performance of his contract, and will give a right of action in case performance is not accepted.¹³ An obligation is extinguished by an offer of performance, made in conformity to the rules therein prescribed, and with intent to extinguish the obligation,¹⁴ and not otherwise.¹⁵ There must be an actual offer¹⁶ of full performance¹⁷ made by the debtor, or by some person on his behalf and with his assent.¹⁸ The offer “must be made to the creditor, or to any one of two or more joint creditors, or to a person authorized by one

12. *Flickinger v. Heck*, 62 Cal. Dec. 377, 200 Pac. 1045.

13. Civ. Code, §§ 1485-1505; *Allen v. Chatfield*, 172 Cal. 60, 156 Pac. 47; *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433. See *Ohielovich v. Krauss*, 2 Cal. Unrep. 700, 11 Pac. 781, and *Sanford v. Savings & Loan Soc.*, 80 Fed. 54, to the effect that the code rules apply to offers of performance which operate a redemption as well as to other offers to perform.

Taking all the sections of the code relating to the subject of tender together, it is evident that the intention of the legislature was to do away with many of the objections by which rights dependent upon offer of performance had been therefore defeated, and to establish more reasonable and more liberal rules upon the subject. It is, therefore, the duty of the courts to construe any doubtful language of the statute in harmony with the

legislative policy. *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115.

See *TENDER* for discussion of essentials for valid tender of money.

14. Civ. Code, § 1485; *Chielovich v. Krauss*, 2 Cal. Unrep. 700, 11 Pac. 781.

15. *Bidegaray v. Ormaca*, 32 Cal. App. Dec. 941, 192 Pac. 176. See *Redington v. Chase*, 34 Cal. 666 (decided before the adoption of the codes, and holding that a tender did not satisfy or extinguish an obligation).

16. Civ. Code, § 1487; *Bidegaray v. Ormaca*, 32 Cal. App. Dec. 941, 192 Pac. 176.

17. Civ. Code, § 1486; *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571 (decided prior to adoption of code and holding creditor not bound when tender is made by stranger unless informed on whose behalf it is made).

18. Civ. Code, § 1487.

or more of them to receive or collect what is due under the obligation, if such creditor or authorized person is present at the place where the offer may be made; and if not, wherever the creditor may be found."¹⁹

A tender by a seller to, and refusal by, one of two persons who have jointly contracted to purchase is a tender to and refusal by both.²⁰ Furthermore, an offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances, to benefit the creditor;¹ and whether made in writing or orally² is of no effect if the person making it is not able and willing to perform according to the offer.³ Section 2074 of the Code of Civil Procedure declaring that "An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property," and section 1496 of the Civil Code, making a similar provision with regard to offers of performance in general, it has been declared, do not dispense with these last requirements.⁴ And the rule stated in section 1498 of the Civil Code, that one making a tender may make it depend upon the due performance of a concurrent condition, does not affect the case, for nevertheless the party must act in good faith and be able and willing to perform. Nor does the fact that

19. Civ. Code, § 1488; Bidegaray v. Ormaca, 32 Cal. App. Dec. 941, 192 Pac. 176.

20. Hoover v. Wolfe, 167 Cal. 337, 139 Pac. 794.

1. Civ. Code, § 1493; Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001; Horan v. Harrington, 130 Cal. 142, 62 Pac. 400; Bidegaray v. Ormaca, 32 Cal. App. Dec. 941, 192 Pac. 176; Langan v. Mariposa etc. Min. Co., 39 Cal. App. 71, 178 Pac. 166; Fox v. Robinson, 18 Cal. App. 585, 123 Pac. 813; McCoy v. Buckley, 11 Cal. App. 241, 104 Pac. 705.

2. Allen v. Chatfield, 172 Cal. 60, 156 Pac. 47; Langan v. Mariposa etc. Min. Co., 39 Cal. App. 71, 178 Pac. 166.

3. Civ. Code, § 1495; Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001; Horan v. Harrington, 130 Cal. 142, 62 Pac. 400; Fox v. Robinson, 18 Cal. App. 585, 123 Pac. 813; McCoy v. Buckley, 11 Cal. App. 241, 104 Pac. 705.

4. Allen v. Chatfield, 172 Cal. 60, 156 Pac. 47; Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001.

the other party was also unprepared to perform furnish any justification for his own inability, nor change what would otherwise be an ineffectual and shadowy form into a substantial, bona fide, and effective tender.⁵

§ 242. Conditional Offer.—A tender is not required to be unconditional. On the contrary, it is expressly provided by the Civil Code that when a debtor is entitled to the performance of a condition precedent to or concurrent with performance on his part, he may make his offer dependent upon the due performance of such condition.⁶ A tender of the indebtedness secured by a pledge is not vitiated by a condition imposed at the time of the tender that the property pledged should be delivered to the pledgor.⁷ So, too, a mortgagor who is entitled to have the reconveyance of the mortgaged property, upon payment of the mortgage debt, is entitled to make his offer of the payment thereof depend upon the execution of such reconveyance.⁸ A person is forbidden, it is true, to make his offer dependent upon any conditions which the other party is not bound, on his part, to perform,⁹ and, it has been declared, if one who is bound to perform a contract annexes an unwarranted condition to his offer of performance, this is, in effect, a refusal to perform.¹⁰ But the obligation to make a tender unconditional is no

5. *Doak v. Bruson*, 152 Cal. 17, 91 Pac. 1001.

6. Civ. Code, § 1498; *Gervaise v. Brookins*, 156 Cal. 103, 103 Pac. 329; *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *Ferreira v. Tubbs*, 125 Cal. 687, 58 Pac. 308; *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115 (tender under decree enforcing trust); *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773; *Smith v. Central & Pac. Improvement Corp.*, 31 Cal. App. Dec. 87, 187 Pac. 456.

7. *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415 (citing authorities). See PLEDGE.

8. *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93. See MORTGAGES.

9. Civ. Code, § 1494; *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115; *Cassariel v. McIntyre*, 31 Cal. App. Dec. 849, 189 Pac. 801; *McCoy v. Buckley*, 11 Cal. App. 241, 104 Pac. 705.

10. *Woody v. Bennett*, 88 Cal. 241, 26 Pac. 117.

more imperative than the obligation to tender the full sum of money due, or the precise personal property or written instruments called for; and, it has been said, there is no more reason for imposing upon the creditor the duty of stating his objections to the thing tendered than there is for requiring him to state his objections to the conditions coupled with the offer. Where no objection is made to conditions attached to an offer of performance, objections are deemed waived.¹¹ It is expressly provided by the code that

“A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.”¹²

§ 243. Time and Place.—The code provides that where an obligation fixes the time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterward.¹³ And aside from this statutory provision, the general rule of law is that a premature offer of performance is ineffectual to put the other party in default, or for any other purpose.¹⁴ But “Where an obligation does not fix the time of performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform.”¹⁵ Under some circumstances an offer

11. *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115. And see *infra*, § 245.

12. Civ. Code, § 1499; *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. 308; *Hancock v. Hunt*, 34 Cal. App. 530, 168 Pac. 142.

13. Civ. Code, § 1490; *Allen v. Chatfield*, 172 Cal. 60, 156 Pac. 47; *Maurer v. King*, 127 Cal. 114, 59 Pac. 290 (holding contract imposed no obligation as to offer of performance within meaning of code provision); *Gardner v. Donaally*, 86 Cal.

367, 24 Pac. 1072 (holding code provision had no application); *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773.

14. *Allen v. Chatfield*, 172 Cal. 60, 156 Pac. 47; *Rhorer v. Bila*, 83 Cal. 51, 23 Pac. 274.

15. Civ. Code, § 1491; *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773 (holding tender made in time).

may be made even after performance is due. Section 1492 of the Civil Code reads as follows:

"Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime."¹⁶

With reference to the place at which an offer of performance may be made, the code provides:

"In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor: 1. At any place appointed by the creditor; or, 2. Whenever the person to whom the offer ought to be made can be found; or, 3. If such person cannot, with reasonable diligence, be found within this state, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the state; or, 4. If this cannot be done, then at any place within this state."¹⁷

When the refusal of an obligee to designate a place of tender is a breach of a condition precedent, the obligor is clearly excused from performance.¹⁸

§ 244. Production of Thing. *At common law, in order to constitute an actual tender, it is ordinarily essential that the thing or things called for by the offer must be of the thing or things called for by the offer.* *By the common law a tender must be of the thing or things called for by the offer.* *there be an actual production of the thing or things called for by the offer.*

16. Liver v. Mills, 155 Cal. 459, 101 Pac. 299 (conditional sale of personal property); Loughborough v. McNevin, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773 (holding tender good); Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982 (arbitration agreement); Stephens v. Weyl-Zuckerman & Co., 33 Cal. App. 566, 165 Pac. 975.

17. Civ. Code, § 1489; W. G. Reese Co. v. House, 162 Cal. 740, 124 Pac. 442 (holding sufficient tender, facts tending to show evasion);

Stein v. Heeman, 161 Cal. 502, 119 Pac. 663 (evasion by vendor of purchaser's tender of performance); Lakeside Ditch Co. v. Packwood Ditch Co., 33 Cal. App. Dec. 754, 195 Pac. 284 (payments); Fox v. Robinson, 18 Cal. App. 585, 123 Pac. 813 (holding law not complied with where one party merely went to residence of other, and, ascertaining that he was not at home, proceeded to make alleged tender).

18. Warner v. Wilson, 4 Cal. 310.

See "Erratum,"
1926 Supp. 466.

contract.¹⁹ Section 1496 of the Civil Code has changed this rule. It is provided by this section that

“The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted.”²⁰

But, it is held, it is only when a tender or offer of performance has been made in conformity with the requirements of the Civil Code, that actual production of the thing to be delivered is excused.¹ Section 1497 of the Civil Code provides that

“A thing, when offered by way of performance, must not be mixed with other things from which it cannot be separated immediately and without difficulty.”

Under the code,

“The title to a thing duly offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect.”²

But “The person offering a thing, other than money, by way of performance, must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire, until the creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it

19. *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928 (money); *Galland v. Lewis*, 26 Cal. 46. But see *Warner v. Wilson*, 4 Cal. 310 (decided prior to adoption of codes and holding that production of subject matter of contract by plaintiff was not necessary, as it was clear that defendants would not perform on their part).

20. *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82 (purchase money); *Flickinger v. Heck*, 33 Cal. App. Dec. 71, 200 Pac. 1045 (sale of corporation stock); *Smith v. Central & Pac. Improvement Corp.*, 31 Cal. App. Dec. 87, 187 Pac. 456 (check); *Sierra Land etc. Co. v. Bricker*, 3 Cal. App.

190, 85 Pac. 665 (holding agreement to return if unsatisfactory is satisfied when an offer is made and refused).

See, also, *Code of Civil Procedure*, section 2074, which provides as follows: “An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.”

1. *Bidegaray v. Ormaca*, 32 Cal. App. Dec. 941, 192 Pac. 176.

2. *Civ. Code*, § 1502; *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853 (holding title did not pass).

no longer, and, if with reasonable diligence he can find a suitable depository therefor, until he has deposited it with such person."³

This last provision, however, can have no application to a case where the purchaser actually receives and retains possession of the property, no matter how reluctant he may be to do so.⁴ It is further provided by the code that

"An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof."⁵

And that "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."⁶

The latter provision does not prescribe the mode of tender, but rather a method of extinguishing an obligation when that object is sought.⁷ The Civil Code also provides that

"If anything is given to a creditor by way of performance, which he refuses to accept as such, he is not bound to return it without demand; but if he retains it, he is a gratuitous depository thereof."⁸

§ 245. Defective Tender.—Section 2076 of the Code of Civil Procedure provides that

"The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have

3. Civ. Code, § 1503; *Bennett v. Potter*, 16 Cal. App. 183, 116 Pac. 681 (sale of automobile).

4. *Tucker v. Scott*, 181 Cal. 734, 186 Pac. 150.

5. Civ. Code, § 1504; *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653 (tender of redemption money).

6. Civ. Code, § 1500.

7. *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433; *Sheller v. Livingston*, 25 Cal. App. 572, 144 Pac. 547.

8. Civ. Code, § 1505; *Conde v. Dreisam Gold Min. Co.*, 3 Cal. App. 583, 86 Pac. 825 (holding conduct of creditor indicated acceptance).

waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind which he requires, or be precluded from objecting afterwards."⁹

This section does not in any way qualify or repeal the provisions of section 1495 of the Civil Code to the effect that an offer made by a person not then able to perform is of no effect.¹⁰ But it is qualified by section 1501 of the Civil Code, which provides, in effect, that the failure to object does not waive a defect which could not, if specified, have been obviated by the person making the offer.¹¹ Under the latter section, however, all objections to the mode of an offer of performance which the creditor has an opportunity to state at the time to the person making the offer and which could be then obviated by him are waived by the creditor if not then stated,¹² and the tender is to be regarded as a valid one.¹³ Section 1501 of the Civil Code is to be liberally construed, and is broad enough to include not only the thing offered, but also the conditions upon which the offer of the performance is made to depend.¹⁴

§ 246. Waiver of Tender or Offer.—Section 1511 of the Civil Code specifies certain grounds excusing the want of performance or offer of performance of an obligation, or

9. *Smiley v. Read*, 163 Cal. 644, 126 Pac. 486 (deed).

10. *Allen v. Chatfield*, 172 Cal. 60, 156 Pac. 47.

11. *Klein v. Markarian*, 175 Cal. 37, 165 Pac. 3; *Allen v. Chatfield*, 172 Cal. 60, 156 Pac. 47.

12. *Hoover v. Wolfe*, 167 Cal. 337, 139 Pac. 794 (stock); *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115 (money); *Peardon v. Markley*, 33 Cal. App. Dec. 723, 195 Pac. 70; *Shermaster v. California Home Bldg. Loan Co.*, 40 Cal. App. 661, 181 Pac. 409 (quitclaim deed offered by vendee to vendor in rescission of contract); *Winkler v. Jerrue*,

20 Cal. App. 555, 129 Pac. 804 (tender of possession of real property on rescission of contract of sale); *McManus v. Patch*, 20 Cal. App. 479, 129 Pac. 613 (money); *Johnson-Locke Mercantile Co. v. Howard*, 6 Cal. Unrep. 748, 65 Pac. 953.

13. *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82 (money); *Sheller v. Livingston*, 25 Cal. App. 572, 144 Pac. 547 (money).

14. *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115; *Barnhart v. Fulkerth*, 73 Cal. 526, 15 Pac. 89. See *supra*, § 242.

any delay therein.¹⁵ It is a general rule that when tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived, or becomes unnecessary, when it is reasonably certain that the offer will be refused, or that payment or performance will not be accepted.¹⁶ Section 1440 of the Civil Code provides:

“If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party.”¹⁷

But in order to constitute an implied waiver of an offer or tender by refusal of the other party to perform his promise, there must be unequivocal refusal to perform the promise, which must be treated and acted upon as such by the party to whom the promise was made.¹⁸ And the

15. *Hoppin v. Munsey*, 61 Cal. Dec. 602, 198 Pac. 398. And see *infra*, §§ 259-268.

16. *Hoppin v. Munsey*, 61 Cal. Dec. 602, 198 Pac. 398; *Lemle v. Barry*, 181 Cal. 1, 183 Pac. 150; *Id.*, 181 Cal. 6, 183 Pac. 148; *Pierce v. Lukens*, 144 Cal. 397, 77 Pac. 996 (quoting *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052. See, also, *Rose's U. S. Notes*); *Jensen v. Corning Farms Co.*, 33 Cal. App. Dec. 411, 194 Pac. 83; *Teague Inv. Co. v. Setchel*, 30 Cal. App. Dec. 776, 186 Pac. 1046.

17. *Hoover v. Wolfe*, 167 Cal. 337, 139 Pac. 794 (sale of stock); *Pasow & Sons v. Harris*, 29 Cal. App. 559, 156 Pac. 997 (sale of goods); *Stum v. Hadrich*, 7 Cal. App. 241, 94 Pac. 82 (sale of personal property).

18. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889 (holding mere assertion by pledgee of lien greater in amount than that to which he is entitled did not dispense with necessity for tender by pledgor); *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27; *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266 (holding no such refusal shown); *Rauer's Law & Collection Co. v. Harrell*, 32 Cal. App. 45, 162 Pac. 125; *Alexander v. Bosworth*, 26 Cal. App. 589, 147 Pac. 607; *Howard v. Galbraith*, 13 Cal. App. 373, 109 Pac. 889 (holding notice of refusal to accept performance before time arrived for performance was equivalent to refusal to perform and was legal excuse for lack of tender and demand); *Ennis Brown Co. v. W. S. Hurst & Co.*, 1 Cal. App. 752, 82 Pac.

refusal to perform must be of the whole contract, or of a covenant going to the whole consideration.¹⁹ So, too, where a contract is severable the refusal of the purchaser to accept a tender of one of items does not operate to waive performance or offer of performance by the seller as to other items.²⁰ But, although the rejection of an offer to perform by one party excuses the other party from performance as a condition precedent, it does not release him from his obligation to perform so long as he insists upon the enforcement of the agreement for his own benefit. He cannot claim under the contract and at the same time repudiate it.¹ In the absence of notice that performance will not be made, one party is not excused from making a proper tender unless it clearly appears that the other would have been unable to perform upon his part.² And the mere fact that one party is absent from the state when performance by the other is required cannot excuse or render impossible an offer of performance. Section 1489 of the Civil Code prescribes how a tender shall be made under such circumstances.³

§ 247. Effect of Performance.—Section 1473 of the Civil Code provides that:

“Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it.”⁴

1056 (holding renunciation sufficient to excuse plaintiff from showing ability or readiness to perform).

19. *Rauer's Law & Collection Co. v. Harrell*, 32 Cal. App. 45, 162 Pac. 125.

20. *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27. As to entire and severable contracts, see *supra*, § 191.

1. *Rhorer v. Bila*, 83 Cal. 51, 23 Pac. 274.

2. *Royal v. Dennison*, 109 Cal. 558, 42 Pac. 39 (decision of department

in same case reported in 4 Unrep. 851, 38 Pac. 39, not sustained).

3. *Swain v. Jacks*, 125 Cal. 215, 57 Pac. 989. See *supra*, § 243.

4. *Erkenbrecher v. Grant*, 61 Cal. Dec. 378, 197 Pac. 120 (holding section should be given full application to facts of case); *Henshaw v. Homeland Co.*, 177 Cal. 381, 170 Pac. 826 (holding contract of security not extinguished by part payment of debt secured); *Dodds v. Spring*, 174 Cal. 412, 163 Pac. 351;

Payment by a surety extinguishes the principal obligation.⁵ And if the purchaser of mortgaged premises has assumed payment of the indebtedness, or has otherwise made himself liable for it, the payment of the debt will extinguish the mortgage, and he cannot take an assignment of it to himself; and a subsequent assignee from him, after maturity, of the indebtedness takes subject to all existing defenses.⁶ Likewise, the assignment of a note to the maker amounts to payment, and the note becomes *functus officio*.⁷ Nor can there be any dispute as to the rule that where two or more persons are jointly liable on an obligation and one of them makes payment of the whole, that obligation is thereby extinguished, and the one paying has a new obligation against the others for their proportion of what he paid for them.⁸ Section 1474 of the Civil Code provides:

“Performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all.”

Sufficiency of Performance.

§ 248. In General.—Where one of two contracting parties performs work according to contract, it is the duty of the other to accept and pay for it.⁹ But the doing of any thing less than, or different from, that designated in

Drinkhouse v. Merritt, 134 Cal. 580, 66 Pac. 785 (agreement to settle claim by provision in will); Wright v. Mix, 76 Cal. 465, 18 Pac. 645 (obligation extinguished by payment). See *infra*, § 253, as to partial performance.

5. Bray v. Cohn, 7 Cal. App. 124, 93 Pac. 893; Crystal v. Hutton, 1 Cal. App. 251, 81 Pac. 1115 (citing authorities). See SURETYSHIP.

6. Dodds v. Spring, 174 Cal. 412, 163 Pac. 351. See MORTGAGES.

7. Gordon v. Wansey, 21 Cal. 77.

8. Enscoe v. Fletcher, 1 Cal. App. 659, 82 Pac. 1075. See CONTRIBUTION.

9. Gilliam v. Brown, 126 Cal. 160, 58 Pac. 466; Wilson v. Fuller, 37 Cal. App. 355, 174 Pac. 671 (contract to sink well); Savage v. Sweeney, 2 Cal. Unrep. 138. See Ledbetter v. Bayside Land Co., 36 Cal. App. Dec. 629 (holding evidence sufficient to support findings that bulkhead was constructed in workmanlike manner and in accordance with specifications).

the contract does not constitute performance.¹⁰ The general rule is that where a person agrees to do a thing for a specified sum to be paid on full performance, he is not entitled to any part of the sum until he has done the thing he agreed to do, unless full performance has been excused, prevented or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy.¹¹ And in an action to recover upon a contract, the material facts of the performance in accordance with the terms fixed must be stated in unequivocal language and not be left to inference.¹² The rule, of course, refers to actions upon the contract for the contract price. The right to sue on an implied contract for the value of a partial performance is a different question.¹³ And, although the general rule is as above stated, yet in some instances a substantial performance will permit a recovery.¹⁴ Moreover, defects in work are no defense to an action to recover for services when they are due to the owner's negligence and not to that of the contractor.¹⁵

It has been declared that where one of the issues is as to whether there was such performance by plaintiff as would entitle him to recover, an instruction that, if the jury believe that defendants did not perform their part,

10. *Merkeley v. Fisk*, 179 Cal. 748, 178 Pac. 945; *Nicholls v. Reid*, 109 Cal. 630, 42 Pac. 298 (holding a contract in writing to sell two specified certificates of bank stock, one of which stands in the name of a deceased person, is not performed by a tender of the possession of such certificate, such tender being ineffectual to transfer title, and that the holder cannot be required to accept one of the certificates agreed to be sold without the other).

11. *Thomas Haverty Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105; *Herdal v. Sheehy*, 173 Cal. 163, 159 Pac. 422; *Carlson v. Sheehan*, 157

Cal. 692, 109 Pac. 29; *Dahlberg v. Girsch*, 157 Cal. 324, 107 Pac. 616; *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Norman v. Hall*, 23 Cal. App. 25, 136 Pac. 720. See *ACT OF GOD*, vol. 1, p. 384.

12. *Merkeley v. Fisk*, 179 Cal. 748, 178 Pac. 945. And see *infra*, § 285.

13. *Thomas Haverty Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105. See *ASSUMPSIT; WORK AND LABOR*.

14. See *infra*, §§ 251, 252.

15. *Murray v. California Conserving Co.*, 33 Cal. App. Dec. 365, 193 Pac. 959.

they must find for plaintiff, is erroneous, as it takes from the jury the issue as to performance by plaintiff.¹⁶ If the findings show how the contract was performed by the contractor, and state facts showing substantial compliance, they sufficiently sustain an allegation of full performance.¹⁷ But findings of performance are of course, unwarranted when not supported by the evidence.¹⁸

§ 249. Performance to Satisfaction of One Party.—Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes, namely: Where fancy, taste, sensibility, or judgment are involved; and where the question is merely one of operative fitness or mechanical utility. The distinction between these two classes of contracts seems to be well recognized, though the line cannot always be clearly drawn. It has been declared to be the rule that where the right involved is one which is submitted to the taste, fancy, feelings or judgment of the party in whose favor the option is given, it may be exercised by such party without any practical or utilitarian reason, and his decision that he is not satisfied is conclusive on the other party and upon the court in which the question is presented.¹⁹⁻²⁰ In such cases the question is not whether the one complaining of the work ought to be satisfied, but

16. *Remy v. Olds et al.*, 4 Cal. Unrep. 240, 21 L. R. A. 645, 34 Pac. 216. See *Pacific Rys. Adv. Co. v. Lion C. Co.*, 37 Cal. App. 387, 174 Pac. 673 (in this case the court states that there is a question whether the general finding of non-performance amounts to a finding of fact, or whether it is but the statement of a conclusion of law).

17. *Griffith v. Happersberger*, 86 Cal. 605, 35 Pac. 137, 487.

18. *Krotzer v. Clark*, 178 Cal. 736, 174 Pac. 657.

19-20. *Thomas Havery Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105; *Tiffany v. Pac. Sewer Pipe Co.*, 180 Cal. 700, 6 A. L. R. 1493, 182 Pac. 428 (applying rule to contract for employment of "expert glazeman" to glaze bricks); *Schuyler v. Pantages*, 36 Cal. App. Dec. 5, 201 Pac. 137 (contract between corporation and vaudeville performer); *Van Demark v. California Home Extension Assn.*, 30 Cal. App. Dec. 269, 185 Pac. 866; *Bruner v. Hegyi*, 42 Cal. App. 97, 183 Pac. 369. See

solely as to the good faith of the dissatisfaction alleged.¹ But it has been held that when it is apparent that the question of satisfaction relates to the commercial value or quality of the subject matter of the contract, it must be shown that it is deficient or defective in these respects, and that the dissatisfaction is reasonable and well founded.² Such a contract does not justify the promisor in arbitrarily, unreasonably and capriciously claiming that he is not satisfied, in order to evade liability, and the courts in doubtful cases, especially when the thing furnished is so attached to the real property of the buyer that its value would be lost to the seller, either wholly or in great part, unless paid for, are inclined to construe such a stipulation as one calling for such performance as should be satisfactory to a reasonable person.³

However, where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation that he must act in good faith, and, if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him.⁴

also, note, 6 A. L. R. 1497. And see note in 4 California Law Review, 500.

1. *Bruner v. Hegyi*, 42 Cal. App. 97, 183 Pac. 369.

2. *Thomas Haverty Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105; *Tiffany v. Pac. Sewer Pipe Co.*, 180 Cal. 700, 6 A. L. R. 1493, 182 Pac. 428; *Van Demark v. California Home Extension Assn.*, 30 Cal. App. Dec. 269, 185 Pac. 866.

3. *Thomas Haverty Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105; *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, 6 A. L. R. 1493, 182 Pac. 428 (quoting from *Elliott on Contracts*); *Allred v. Sheehan*, 36 Cal. App. Dec. 508 (sale of land

with improvements to be constructed thereon); *Bruner v. Hegyi*, 42 Cal. App. 97, 183 Pac. 369 (contract to do tile work); *Bryan Elevator Co. v. Law*, 31 Cal. App. 204, 160 Pac. 170; *Gladding, McBean & Co. v. Montgomery*, 20 Cal. App. 276, 128 Pac. 790.

4. *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, 6 A. L. R. 1493, 182 Pac. 428; *Van Demark v. California Home Extension Assn.*, 30 Cal. App. Dec. 269, 185 Pac. 866 (sale of land).

Such a construction of the rule has been applied to a large variety of cases decided in other jurisdictions. See the following cases for enumerations of such instances:

§ 250. Approval by Third Person.—In some instances the performance of a contract is subject to the approval of a third person. This is frequently the case with building and construction contracts, where by such a stipulation, the parties constitute the person selected an arbitrator, and the provision is held, if anything, more binding than an ordinary submission, for the reason that it enters into and becomes a part of the consideration of the contract, and without which the contract would not, in all probability, have been made.⁵ There can be no doubt of the validity of a provision in a contract that the amount to be paid shall be determined by the estimate or certificate of an engineer or other person agreed upon.⁶ So, too, a provision in a contract for railroad construction that the chief engineer of the railroad is empowered to decide conclusively as to the classification and quantity of materials moved is binding on the parties, in the absence of an averment and proof of fraud or such gross mistake as to imply fraud.⁷ Moreover, where work is to be done to the satisfaction of a person, and evidenced by a certificate or estimate to that effect, the production of such a certificate or estimate is a condition precedent to a right of action upon the contract.⁸ The law does not contemplate in cases like this that the engineer shall in person make the estimates, for, on account of the extent of the work, such a course might be impracticable. It is suffi-

Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 6 A. L. R. 1493, 182 Pac. 428; *Schuyler v. Pantages*, 36 Cal. App. Dec. 5, 201 Pac. 137; *Van Demark v. California Home Extension Assn.*, 30 Cal. App. Dec. 269, 185 Pac. 866.

5. *City Street Imp. Co. v. Marysville*, 155 Cal. 419, 23 L. R. A. (N. S.) 317, 101 Pac. 308.

6. *Gray v. Cotton*, 166 Cal. 130, 134 Pac. 1145; *City Street Imp. Co. v. Marysville*, 155 Cal. 419, 23 L. R. A. (N. S.) 317, 101 Pac. 308.

7. *Rialto Construction Co. v. Reed*, 17 Cal. App. 29, 118 Pac. 473.

8. *City Street Improv. Co. v. City of Marysville*, 155 Cal. 419, 23 L. R. A. (N. S.) 317, 101 Pac. 308; *Coplew v. Durand*, 153 Cal. 278, 16 L. R. A. (N. S.) 791, 95 Pac. 38; *Tally v. Parsons*, 131 Cal. 516, 63 Pac. 833; *Cox v. McLaughlin*, 63 Cal. 196; *Loup v. California etc. Co.*, 63 Cal. 97; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54. See ARBITRATION AND AWARD, vol. 3, p. 49; ARCHITECTS, vol. 3, p. 107.

cient if he exercises a general supervision over their making.⁹

Where the parties agree that the performance or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake.¹⁰ But when a decision is induced by fraud or collusion¹¹ or is influenced by gross mistake amounting to fraud,¹² it is not conclusive and may be impeached.

§ 251. Substantial Performance.—The common-law rule which required a strict and literal performance as a condition precedent to recovery upon a contract has now been greatly relaxed. It is settled, especially in the case of building contracts, that where one party is enjoying the fruits of a contractor's work, if there has been a substantial performance in good faith and the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent and do not substantially affect the usefulness of the work for the purposes for which it was intended, the contractor may, in an action upon the con-

9. Rialto Construction Co. v. Reed, 17 Cal. App. 29, 118 Pac. 473.

10. Connell v. Higgins, 170 Cal. 541, 150 Pac. 769 (building contract); California Sugar etc. Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671 (sale of lumber); Gray v. Cotton, 166 Cal. 130, 134 Pac. 1145 (construction); Scanlan v. San Francisco & S. J. Ry. Co., 128 Cal. 586, 61 Pac. 271 (construction); Newport Wharf etc. Co. v. Drew, 125 Cal. 585, 58 Pac. 187 (construction); Moore v. Kerr, 65 Cal. 519, 4 Pac. 542 (construction). See ARBITRATION AND AWARD, vol. 3, p. 68.

11. Atchison etc. Ry. Co. v. West,

176 Cal. 148, 167 Pac. 868. See ARBITRATION AND AWARD, vol. 3, p. 79.

12. California Sugar etc. Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671 (sale of lumber); Doran, Brouse & Price v. Henry Cowell Co., 37 Cal. App. 478, 174 Pac. 90 (sale of cement); Rialto Construction Co. v. Reed, 17 Cal. App. 29, 118 Pac. 473 (declaring that although contract did not contemplate that progressive estimates should be accurate, it did require final and correct estimate when work was finished or contract canceled). See ARBITRATION AND AWARD, vol. 3, p. 77.

tract, recover the amount unpaid on the contract price, less the amount allowed as damages for the failure in strict performance.¹³ It is said that substantial justice is provided by this course of procedure and no property right is violated.¹⁴ The rule that a substantial compliance with the terms of a building contract is a sufficient performance is applicable as well to an agreement whereby the contractor agrees to erect a building on his own lot in accordance with certain plans and to sell the lot and the building for a specified price, as to a contract where the building is erected on a lot owned by the party for whom the structure is to be built. The rule, however, it has been declared, is of no very great importance in a case where material departures from the original contract are either consented to before made or

13. *Thomas Haverty Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105, per Shaw, J. (citing *Collins v. Rarrish*, 182 Cal. 360, 188 Pac. 550; *Rischard v. Miller*, 182 Cal. 351, 188 Pac. 50; *Smith v. Mathews etc. Co.*, 179 Cal. 797, 179 Pac. 205; *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Jones etc. Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290; *City S. I. Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686). See, also, as supporting these views: *Herdal v. Sheehy*, 173 Cal. 163, 159 Pac. 422 (holding where mistake in the location of building was in no way attributable to the owner, contractor must bear resulting loss); *American etc. Co. v. Packer*, 130 Cal. 459, 62 Pac. 744 (discussing right to rescind in such case); *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840; *Voorman v. Voight*, 46 Cal. 392; *Conrad v. Foerst*, 36 Cal. App. Dec. 218;

Joseph Musto Sons-Keenan Co. v. Pacific States Corp., 32 Cal. App. Dec. 787, 192 Pac. 138; *Buckley v. County of Marin*, 25 Cal. App. 577, 144 Pac. 545; *Norman v. Hall*, 23 Cal. App. 25, 136 Pac. 720 (holding performance defective in a substantial respect); *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723 (the court, however, declaring: "Each and all of the just and equitable principles upon which the doctrine of substantial performance rests are absent from this case"); *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. 382; *Nishkian v. Chisholm*, 2 Cal. App. 496, 84 Pac. 312 (agreement to plant vineyard); *Carpenter v. Ibbetson*, 1 Cal. App. 274, 81 Pac. 1114 (contract held substantially performed in spite of defects in stairway); *Peterson v. Hubbard*, 2 Cal. Unrep. 607, 9 Pac. 106 (agreement not to pollute stream).

14. *Thomas Haverty Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105.

acquiesced in after made.¹⁵ And it does not apply when the contract contains a valid fire and earthquake clause, providing expressly that in case of loss or destruction of the building by fire or earthquake, the owner shall lose the installments paid, and the contractor shall lose installments not then due.¹⁶

§ 252. What Constitutes Substantial Performance.—Notwithstanding the clear statement of general principles by the supreme court, as set out in the preceding section, the question, What constitutes substantial performance? is one of some difficulty.¹⁷ No precise rule can or ought to be laid down upon this subject, but whenever the question arises, it is to be determined from a consideration of the facts and circumstances of the case.¹⁸

Since the rule as to what shall constitute performance has become so indefinite, it is an important consideration, in determining whether there has been a substantial performance, that the deviations or omissions are so slight that they might have been made by one who was honestly endeavoring to comply with his contract,^{18a} as, for example, when, considering the character of the work, they are unavoidable.^{18b} Such a conclusion manifestly cannot be reached when inferior or defective material is used

15. *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371.

16. *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723.

17. *Thomas Havery Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105.

18. *Collins v. Ramish*, 182 Cal. 360, 188 Pac. 550; *Smith v. Mathews Construction Co.*, 179 Cal. 797, 179 Pac. 205; *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Schindler v. Green*, 149 Cal. 752, 87 Pac. 627; *American Type etc. Co. v. Packer*, 130 Cal. 459, 62 Pac. 744; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Harlan v. Stuffle-*

beem, 87 Cal. 508, 25 Pac. 686; *Conrad v. Foerst*, 36 Cal. App. Dec. 218; *Joseph Musto Sons-Keenan Co. v. Pacific States Corp.*, 32 Cal. App. Dec. 787, 192 Pac. 138; *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. 382. See *Norman v. Hall*, 23 Cal. App. 25, 136 Pac. 720 (holding performance defective in a substantial respect).

18a. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740.

18b. *Joseph Musto Sons-Keenan Co. v. Pacific States Corp.*, 32 Cal. App. Dec. 787, 192 Pac. 138.

throughout a building.^{18c} So, too, it must be determined whether defects in performance are trivial and of a minor character, as compared with the extent and magnitude of the entire work embraced in the contract,^{18d} or whether they pervade the whole, and are so essential as substantially to defeat the object which the parties intend to accomplish;^{18e} and whether they are susceptible of remedy at a reasonable cost.^{18f}

The rescission of a building contract by the owner is not warranted by the failure of the contractor to place cupboards in the kitchen of the house where they can be supplied without injury to the structure or impairment of the contract rights of the owner.^{18g} And, it has been held that a finding that a building contractor substantially completed his contract is consistent with finding that some places in the house erected were not properly grained and finished.¹⁹ So in an action to recover the balance due for work done and materials furnished a ruling that there has been substantial performance is justified where the departures from strict performance were known to the defendants, and they failed to demand any re-execution of the work or change in the materials.²⁰ Clearly, though, the placing of a building partly upon other land than the described lot upon which it was to be erected is not a compliance with the agreement.¹ Where the only issue in an action upon a contract to deliver spirits in good packages was whether the packages were good, it was held that an instruction to the jury that if the packages

18c. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740.

18d. *Thomas Haverty Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105.

18e. *Smith v. Mathews Construction Co.*, 179 Cal. 797, 179 Pac. 205; *Connell v. Higgins*, 170 Cal. 541, 160 Pac. 769; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740.

18f. *Collins v. Ramish*, 182 Cal. 360, 188 Pac. 550; *Perry v. Quack-*

enbush, 105 Cal. 299, 38 Pac. 740; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Carpenter v. Ibbetson*, 1 Cal. App. 272, 81 Pac. 1114.

18g. *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371.

19. *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686.

20. *Smith v. Mathews Construction Co.*, 179 Cal. 797, 179 Pac. 205.

1. *Herdal v. Sheehy*, 173 Cal. 163, 159 Pac. 422.

containing the spirits were not good, there was not such a substantial compliance with the contract as to entitle the plaintiff to recover, was not erroneous.^{1a}

§ 253. Partial Performance.—Generally speaking, partial performance of an entire or indivisible contract by one of the parties does not warrant a recovery against the other. Until performance is completed there is in such case no obligation to pay. Full and substantial performance is a condition precedent to the right to maintain an action.² The code provides as follows:

“A partial performance of an indivisible obligation extinguishes a corresponding proportion thereof if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it without injuring his own property, his retention thereof is not presumed to be voluntary.”³

So when a contract is made with reference to several parcels of property belonging to one person, the obligations of the agreement will not be met by performance

1a. *Voorman v. Voight*, 46 Cal. 392.

2. *Jones & Laughlin etc. Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290; *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 766, 106 Pac. 55; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; *First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 40 Pac. 45; *Karales v. Los Angeles Creamery Co.*, 36 Cal. App. 171, 171 Pac. 821; *Harrison v. Turner*, 27 Cal. App. 423, 150 Pac. 395. See, also, cases cited *supra*, § 248. And see *supra*, § 191, as to interpretation of entire and severable contracts.

It is true that in such cases the party cannot prevail in an action technically on the contract for the

price, but it is well settled that he may recover in a proper action the reasonable value of goods delivered to and retained by the buyer or of services performed. *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 Pac. 989; *Jones & Laughlin etc. Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290; *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523. See *ASSUMPSIT*, vol. 3, p. 382 et seq.; *WORK, LABOR AND MATERIALS*, as to recovery on common counts for partial performance.

3. Civ. Code, § 1477; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515 (sale of land). See, also, *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61 (holding purchase of only part interest in mine binding upon parties).

with reference to one of them.⁴ It is true that under some contracts for the sale of goods payments for installments actually delivered may be enforced separately after they become due. But this fact does not affect the entirety of such contracts with reference to the obligations to buy and sell the whole amount of the goods agreed upon.⁵ The general rule, however, is inapplicable where parties have agreed upon an extension of the time within which to perform and performance is completed within such extension, or where one party has neglected a duty on account whereof a strict performance cannot be had within the specified time after the obstacle to performance has been removed, in which cases the performing party may recover upon the contract, the same being an entire one.⁶

The rule of the early common law was, in effect, that payment of an amount less than that due upon a liquidated and undisputed debt did not operate as a satisfaction, even though accepted as such. It rested largely, if not entirely, upon the theory that an agreement to accept a part payment in satisfaction of a liquidated and undisputed debt was without a good and sufficient consideration, and therefore was but a mere nudum pactum.⁷ Section 1524 of the Civil Code, however, provides:

“Part performance of an obligation, either before or after breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing, for that purpose, though without any new consideration, extinguishes the obligation.”⁸

4. *Law v. San Francisco Gas etc. Co.*, 168 Cal. 112, Ann. Cas. 1915D, 842, 142 Pac. 52; *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305.

5. *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55. See SALES.

6. *Lapp-Gifford Co. v. Muscoy*

Water Co., 166 Cal. 25, 134 Pac. 989.

7. *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 Pac. 624. See ACCORD AND SATISFACTION, vol. 1, p. 129.

8. *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 Pac.

Such an agreement is, however, subject to all the rules applicable to other contracts.⁹ If the consent of one of the parties thereto was obtained through fraud exercised by the other, the former has the right to rescind the agreement,¹⁰ provided such rescission is made promptly upon discovering the facts which entitle him to rescind, coupled with an offer to restore benefits received by him.¹¹

The rule that a party who has failed fully to perform his contract cannot recover for part performance applies only to entire, and not severable, contracts, which are, in legal effect, independent agreements about different subjects although made at the same time. There may be a recovery for a part performance of a divisible contract.¹²

§ 254. Destruction of Building in Course of Erection.—

Where a building partially constructed is destroyed by fire, and where the contract is entire and contains no express provision regarding the rights of the parties in that contingency, if the parties do not rescind or abandon, but stand upon the contract, it controls their rights. In such a case, the contractor and the owner each must perform his part of the contract. If the whole price is due upon completion, the contractor must complete it before he can lawfully demand payment. If the price is payable in installments during the progress of the work, he cannot recover an installment earned but not paid at the time

624; *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075. See *ACCORD AND SATISFACTION*, vol. 1, p. 130. See *supra*, § 113 et seq., for general discussion of consideration.

9. *Dobinson v. McDonald*, 92 Cal. 33, 27 Pac. 1098.

10. Civ. Code, § 1689. See *CANCELLATION OF INSTRUMENTS*, vol. 4, p. 770; *FRAUD AND DECEIT*, for discussion of fraud as ground for rescission of contracts generally.

11. *Dobinson v. McDonald*, 92 Cal. 33, 27 Pac. 1098. See *supra*, § 232.

12. *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*, 184 Cal. 21, 192 Pac. 847; *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523; *Porter v. Fisher*, 4 Cal. Unrep. 324, 34 Pac. 700. As to entire and divisible contracts, see *supra*, § 191.

of the fire, until the reconstruction has proceeded to the stage necessary to make it due. The contractor must stand the loss resulting from the fire and must replace the structure at his own expense. When he has done so, he may recover the full contract price. Such destruction does not excuse him from completing performance of the contract, nor does it prevent performance within the meaning of section 1511 of the Civil Code.¹³ And it has been held that upon such a contract, if the contractor neglects to complete the performance after destruction, the owner may recover from him the installments paid prior thereto.¹⁴

A building contract, however, may provide for such a contingency, and in case it does, its provisions will, of course, control.¹⁵ Where a contract contains a clause providing that in the event the building should, before completion, be wholly destroyed by fire, then the loss occasioned thereby shall be sustained by the owner to the extent that installments thereon have been paid, or may be due, and the loss occasioned thereby and to be sustained by the contractor shall be for the uncompleted portion of the work upon which he may be engaged at the time of the loss and for which no payment is yet due, an installment earned and unpaid at the time of the destruction is "due" within the meaning of such clause apportioning the loss, notwithstanding the failure of the architect to issue a certificate to that effect, and the contractor is entitled to recover the amount thereof without reconstructing the whole or any portion of the building,

13. Ahlgren v. Walsh, 173 Cal. 27, 158 Pac. 748, per Shaw, J. (citing Wilson v. Alcatraz etc. Co., 142 Cal. 182, 75 Pac. 787; Sample v. Fresno Flume etc. Co., 129 Cal. 222, 61 Pac. 1086; Barrere v. Sompe, 113 Cal. 97, 45 Pac. 177; Wilmington T. Co. v. O'Neil, 98 Cal. 1, 32

Pac. 705; Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115).

14. Ahlgren v. Walsh, 173 Cal. 27, 158 Pac. 748; Green v. Wells, 2 Cal. 584.

15. Ahlgren v. Walsh, 173 Cal. 27, 158 Pac. 748; Anderson v. Quick, 163 Cal. 658, 128 Pac. 871.

and without securing the issuance of the architect's certificate therefor.¹⁶

§ 255. Agreement by Owner to Insure.—A provision in a building contract, that in case the building shall, before completion, “be wholly or partially destroyed by fire, then the loss occasioned thereby shall be sustained by the owners, and the owners agree to carry an insurance for the full amount of labor and materials as the work progresses,” does away with the rule that in ordinary cases the risk of fire is upon the contractor, and that he must rebuild if, before completion, the building is burned. Such a provision puts such loss upon the owner, and, in effect, requires him to insure for the mutual benefit of himself and the contractor to the full value of the labor and material that may be subject to destruction during the progress of the work. The contractor is entitled, on equitable principles, upon the abandonment of the building by mutual consent after the fire, to share in the amount realized from the insurance, to the extent that he was unpaid for the work done at the time of the fire.¹⁷ But when, independent of any agreement between the parties, the owner takes out insurance upon his interest in the building, the contractor is not entitled to share in the proceeds thereof after a partial destruction.¹⁸

§ 256. Completion of Work by Owner.—When a contractor wrongfully fails or refuses to complete his contract after a partial performance, the owner has the option to

16. Ahlgren v. Walsh, 173 Cal. 27, 158 Pac. 748 (holding that the complete destruction of the building while in course of construction by a fire caused by an earthquake which partially destroyed it was total destruction within the meaning of the clause apportioning the loss in the event of its total destruction by fire or earthquake;

that it was immaterial that an interval of a day elapsed between the earthquake which started the fire and the burning of the building).

17. Butler v. Ng Chung, 160 Cal. 435, Ann. Cas. 1913A, 940, 117 Pac. 512.

18. Anderson v. Quick, 163 Cal. 658, 126 Pac. 871.

require full performance by the contractor as a condition precedent to any recovery thereupon, or to payment for the work and materials furnished thereunder,¹⁹ or to complete the work at the cost of the contractor.²⁰ Building contracts frequently contain a provision authorizing the owner, under certain circumstances, to take possession of and to complete the building after a partial performance by the contractor,¹ and when the right of completion is given by the contract, after notice as provided for therein, the completion of the work by the owner after such notice must be deemed a completion of the work under the contract.² Such a condition, however, does not require that the owner shall, on default of the contractor, either finish the work in his place, or wait until the time has expired when the contract was to be finished under the agreement, and then proceed against the contractor for damages. The owner may, instead, enter into an independent contract for the completion of the work,³ and such subsequent contract is as disconnected from the original contract as if it were for the construction of a different building.⁴

19. *Dahlberg v. Girsch*, 157 Cal. 324, 107 Pac. 616.

20. *Dahlberg v. Girsch*, 157 Cal. 324, 107 Pac. 616 (holding owner estopped by election to complete contract to urge that contractor could not recover residue left after the reasonable expense of the work by the owner had been deducted from the contract price); *Russell v. Ross*, 157 Cal. 174, 106 Pac. 583; *Bryant v. Broadwell*, 140 Cal. 490, 74 Pac. 33. See, also, *Tremble v. Truman*, 41 Cal. App. 8, 181 Pac. 800 (holding evidence showed abandonment by contractor). And see *MECHANICS' LIENS* as to liability of owner to lien claimants upon his completing building abandoned by contractor.

1. *Dunne Inv. Co. v. Empire State S. Co.*, 27 Cal. App. 208, 150 Pac. 405, 411 (action on surety bond); *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 632, 112 Pac. 892.

2. *O'Brien v. Garibaldi*, 15 Cal. App. 518, 115 Pac. 249 (holding, however, that the contractor, in such a case, is entitled to receive only the balance of the contract price that may remain over and above the cost of completion); *Hughes Brothers v. Hoover*, 3 Cal. App. 145, 84 Pac. 681.

3. *Dingley et al. v. Greene et al.*, 2 Cal. Unrep. 441, 6 Pac. 81.

4. *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. 651.

A provision that if the contractor during the progress of the work refuses or neglects to supply a sufficiency of materials or workmen to complete the work within the time limited for a period of more than three days after notice in writing from the owner to furnish the same, the owner may furnish the same, and the reasonable expense thereof shall be deducted from the contract price, applies only where the contractor is proceeding under the contract but fails to provide for its completion within the time limited, and has no application where the contractor entirely abandons the contract.⁵ The same is true where a contract between an original contractor and a subcontractor contains such a provision, and where, upon abandonment of work by a subcontractor, the owner completes the same, and deducts the amount thereof from the amount payable to the contractor, the latter is damaged in such amount, and may recover upon the bond of the subcontractor.⁶ It is to be noted that the effect of such a provision is to permit the owner to furnish men and material for the contractor's use only; that it does not authorize the owner to take charge of the work himself.⁷ Where a building contract has been abandoned and the building completed by the owner as permitted by the contract, the owner, in an action on the contractor's bond, may recover money paid for attorney's fees in defending actions to recover upon lien claims.⁸

Liability for defects. — An original contractor, having furnished the materials and performed the work up to the stage when he abandoned it, is conclusively bound to know all defects in the existing materials and workmanship, and is bound under his contract to correct them.

5. *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 632, 112 Pac. 892.

6. *New England etc. Co. v. Chicago etc. Co.*, 36 Cal. App. 584, 172 Pac. 1122.

7. *Gray v. Bekins*, 62 Cal. Dec.

44, 199 Pac. 767; *American-Hawaiian Eng. etc. Co. v. Butler*, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280.

8. *Cohn v. Smith*, 37 Cal. App. 764, 174 Pac. 682.

The new contractor, it has been declared, is not bound to know of defects that were not called to his attention or apparent to a skilled observer when he entered upon his work, and such defects are not covered by his contract. He is only bound to correct without extra compensation defects which were then apparent to him. It has been said, however, that it is impossible to put a new contractor, employed to complete an abandoned work, precisely in the same relation to the work occupied by the first contractor, even though he has agreed to finish the work according to the requirements of the original contract.⁹

§ 257. Waiver of Defects or Objections.—The strict performance of a contract may be waived. A person for whose benefit anything is to be done may, if he pleases, dispense with any part of, or any circumstance in the mode of, performance.¹⁰ It has been held that, by a failure to demand any re-execution of work or change in materials, departures from strict performance according to the letter of the specifications are waived.¹¹ But the mere failure of an owner, during the progress of the work, to express dissatisfaction therewith, or direct the attention of the contractor to omissions, cannot, under all circumstances, be deemed a waiver by the former of his right to a structure called for by the contract.¹² And

9. *Long Beach etc. Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499.

10. *Thomas Haverty Co. v. Jones*, 61 Cal. Dec. 357, 197 Pac. 105 (building contract); *Duff v. Anderson*, 33 Cal. Dec. 815, 195 Pac. 445; *Meyer v. Sullivan*, 40 Cal. App. 723, 181 Pac. 847; *Ellsworth v. Knowles*, 8 Cal. App. 630, 97 Pac. 690. And see *infra*, § 275. See *supra*, §§ 216, 239, as to waiver of conditions.

11. *Smith v. Mathews Construction Co.*, 179 Cal. 797, 179 Pac. 205.

12. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Banducci v. Sresovich*, 35 Cal. App. Dec. 185, 199 Pac. 72. See *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371 (holding plaintiff estopped from asserting that the defendant made departures from the specifications in changing the location of the house from the middle to one side of the lot, and in making the foundation of brick, instead of concrete, where she had full knowledge thereof when the changes were made but failed to object thereto).

where it appears that defects in the work constitute material departures from the contract and were made by the contractor willfully and with intent to defraud the owner, and that the latter was thereby defrauded, neither the contractor nor his assignee is in any position to assert that the owner waived his right to object to the defects by failing to serve a proper statement thereof as required by the contract.¹³ A finding that the plaintiff had waived deviations in the specifications is not erroneous as being without the pleadings, where evidence was introduced without objection and the trial had upon the theory that the waiver was an issue within the pleadings.¹⁴

§ 258. Acceptance as Waiver.—It is competent for the parties to accept work done and to bind themselves to pay for it, although the contract has not been fully performed. It has been variously declared that the acceptance of a building, in the absence of fraud or mistake, implies a waiver of any claim for damages on account of nonperformance in any particular;¹⁵ that where the owner, with full knowledge of all the defects in the work, accepts and pays for it, he thereby waives any claim for damages.¹⁶ And even a partial payment may be considered in connection with the other conduct of the employer in determining whether there has been a waiver.¹⁷ However, an owner may receive and use a structure built for him by a contractor without necessarily waiving his right to offset damages occasioned by defects or imperfect completion against the contract price. This is so even where the defects may be classed as trivial, and it be assumed that substantial completion has been made by the contractor.¹⁸ And notwithstanding the fact

13. *Patten & Davies Lbr. Co. v. Arigo Co.*, 181 Cal. 48, 183 Pac. 439.

14. *Giberson v. Fink*, 28 Cal. App. 26, 161 Pac. 371.

15. *Mannix v. Wilson*, 18 Cal. App. 595, 123 Pac. 961.

16. *Sirch E. & T. Laboratories v. Garbutt*, 13 Cal. App. 435, 110 Pac. 140.

17. *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523.

18. *Stephens v. Weyl-Zuckerman & Co.*, 33 Cal. App. 566, 165 Pac. 975;

that notice of completion of a building has been given by the owner, this will not constitute such an acceptance as to release the obligors on the contractor's bond where certain of the defects in question were not apparent at the time the notice was given, and the notice was given under the distinct understanding that, as to the defects in question, there was no acceptance.¹⁹

It is not necessary that an entire work should be completed before there can be an acceptance of any part of it.²⁰ And in an action upon a contract, it is sufficient for the plaintiff to give evidence of full performance on his part; and, if such evidence of performance is given, he is not required to prove that the work was accepted by the defendant, though such acceptance is alleged in the complaint.¹ If a contractor relies upon any acts showing an acceptance of a building erected by him, or waiver of full performance of his contract, he must plead the same.²

Excuses for Nonperformance.

§ 259. **In General.**—Under certain circumstances performance of contracts is excused. Performance by the party not in fault is excused by the wrongful refusal³ or

Machinery & Electrical Co. v. Young Men's Christian Assn., 22 Cal. App. 416, 134 Pac. 724. See *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 74 Pac. 357 (holding use of temporary structure did not furnish evidence of acceptance of permanent bridge). And see *Grosse v. Petersen*, 30 Cal. App. 482, 158 Pac. 511 (holding breach of contract to manufacture soap was not waived by the acceptance of inferior soap after the plaintiff had knowledge of some complaints of customers as to efficacy of soap, such complaints being few and of vague character). See **DAMAGES.**

19. *Summers v. L. F. S. Syndicate*, 31 Cal. App. Dec. 566, 189 Pac. 286. As to filing of notice of completion of building by owner, see **MECHANICS' LIENS.**

20. *Sirch E. & T. Laboratories v. Garbutt*, 13 Cal. App. 435, 110 Pac. 140.

1. *Gilliam v. Brown*, 126 Cal. 160, 58 Pac. 466.

2. *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723. See *infra*, §§ 268, 285.

3. *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177.

failure⁴ of the other party to perform. The courts, however, ordinarily take the attitude that parties should be careful about making contracts, and will not relieve them from performance for light and trivial reasons.⁵ The parties may have made an unfortunate arrangement, but when they have entered into it voluntarily, they are bound by it,⁶ in the absence of equitable grounds for avoidance.⁷ The parties must be presumed to have contracted with reference to existing conditions which are known to them.^{7a} Moreover, unforeseen hardship is no excuse.⁸ Thus, where one contracts to furnish capital, a financial panic does not excuse performance.⁹ And, although there is some authority to the contrary,¹⁰ the general rule seems to be that the fact that compliance with his contract would involve greater expense than he anticipated will not excuse the promisor.¹¹ Nor is it a defense that the law has rendered performance difficult or very expensive.¹² Moreover, a person contracting with eyes open and aware of the facts is presumed to undertake performance at the risk of interference from agencies not ex-

4. *Twomey v. People's Ice Co.*, 66 Cal. 233, 5 Pac. 158 (holding, where contract of hotel was to take ice exclusively from one factory, and factory was to furnish required amounts, purchase by hotel from another factory excused further performance by factory).

5. *California Cured Fruit Assn. v. Stelling*, 141 Cal. 713, 75 Pac. 320; *Barrere v. Soms*, 113 Cal. 97, 45 Pac. 177, 572.

6. *Christy v. Sullivan*, 50 Cal. 337, 19 Am. Rep. 655; *Kinsey v. Wallace*, 36 Cal. 462.

7. *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Gazos Creek Mill etc. Co. v. Coburn*, 8 Cal. App. 150, 96 Pac. 359.

7a. *Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817 (contract affecting lands in San Fran-

cisco entered into after destruction of records in April, 1906).

8. *Metzler v. Thye*, 163 Cal. 95, 124 Pac. 721.

9. *Metzler v. Thye*, 163 Cal. 95, 124 Pac. 721.

10. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, L. R. A. 1916F, 1, 156 Pac. 458 (this case, dealing with a contract for the sale of gravel, seems to be decided upon the theory that the expense of removal would be so great as to render the gravel practically non-existent).

11. *Metzler v. Thye*, 163 Cal. 95, 124 Pac. 721. And see note in 4 *California Law Review*, p. 407.

12. *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 Pac. 1085; *Klauber v. San Diego Street-Car Co.*, 95 Cal. 353, 30 Pac. 555.

pressly provided against.¹³ And where a contract recites that, unless for certain excepted reasons the promisor shall be unable to perform, he shall at all times be required to do so, all other excuses for nonperformance are excluded by implication.¹⁴

Obviously, nonperformance need not be excused when performance is not due.¹⁵

§ 260. Prevention Generally.—The Civil Code provides by section 1511 that

“The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or, 3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time.”¹⁶

It is further provided by the Civil Code that

“If the performance of an obligation is prevented by any cause excusing performance, other than the act of the creditor, the debtor is entitled to a ratable proportion

13. *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29. See *infra*, § 264, as to act of God as excusing performance.

14. *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787.

15. *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355.

16. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889 (construing subdivision 3); *McCue v. Bradbury*, 149 Cal. 108, 84 Pac. 993

(relieving against forfeiture induced by fraud); *Pierce v. Lukens*, 144 Cal. 397, 77 Pac. 996 (applying subdivision 3); *Edson v. Mancebo*, 37 Cal. App. 22, 173 Pac. 484 (sale of stallion); *Suhr v. Metcalfe*, 33 Cal. App. 56, 164 Pac. 407 (holding that section 1511 of the Civil Code did not apply, and that there being no demand for additional time by the contractor as provided by the contract, delays were not excused).

of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance."¹⁷

Thus a party who has contracted to perform an act for an agreed consideration may maintain an action upon the contract even though he himself has failed fully to perform if performance on his part was prevented by operation of law, the act of God, or of the public enemy.¹⁸ In consonance with the language and spirit of section 1511 of the Civil Code, equity will refuse to enforce a forfeiture at the instance of one who has obtained the strictly legal right to it by fraud, deceit or any other form of oppressive practice; and, upon the other hand, will relieve the innocent where such a forfeiture so secured is sought to be enforced.¹⁹

§ 261. Prevention by One Party.—As indicated above, by force of the provisions of section 1511 of the Civil Code, prevention by one party will excuse want of performance or delay on the part of the other.²⁰ The refusal of one party to make payment as called for by a contract excuses the other party from further performance.¹ And under section 1512 of the same code,

“If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits

17. Civ. Code, § 1514.

18. *Gray v. Bekins*, 62 Cal. Dec. 44, 190 Pac. 767.

19. *McCue v. Bradbury*, 149 Cal. 108, 84 Pac. 993.

20. *Antonelle v. Lumber Co.*, 140 Cal. 309, 73 Pac. 966; *White v. Fresno National Bank*, 98 Cal. 166, 32 Pac. 979; *Houghton v. Steele*, 58 Cal. 421; *Puritas Laundry Co. v. Green*, 15 Cal. App. 654, 115 Pac. 660; *Vulcan Iron Works v. Cook*, 15 Cal. App. 410, 114 Pac. 995. And

see *Gray v. Wells*, 118 Cal. 11, 50 Pac. 23 (defects in construction of bulkhead due to interference by owner); *Blair v. Brownstone Oil etc. Co.*, 17 Cal. App. 471, 120 Pac. 41 (performance of contract to complete oil well prevented by refusal to furnish tools). See, also, *Dodge v. Avery*, 36 Cal. App. 533, 172 Pac. 759.

1. *Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 252, 90 Pac. 51 (sale of goods). See **SALES**.

which he would have obtained if it had been performed by both parties.”³

In connection with these provisions sections 1515 and 1440 of the Civil Code are to be considered. Section 1515 reads:

“A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it.”³

Section 1440 provides that

“If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party.”⁴

Clearly, then, when an owner, without just cause, prevents a contractor from completing a building in the course of construction, the latter is entitled to treat the contract as rescinded, and to recover the reasonable value of the work performed and materials furnished at the request of the owner.⁵ But if one party has not actually prevented performance but has merely committed a breach

2. Civ. Code, § 1512; *Carlson v. Sheehan*, 157 Cal. 602, 109 Pac. 29 (building contract); *Stanton v. Carnahan*, 15 Cal. App. 527, 115 Pac. 339 (contract with broker for sale of real estate).

3. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 389 (construing subdivision 3 of section 1511 of the Civil Code).

4. *Liver v. Mills*, 155 Cal. 459, 101 Pac. 299 (holding repudiation of contract by assignee of vendees relieved vendors of obligation to perform); *Rauer's Law & Collection Co. v. Harrell*, 32 Cal. App. 45, 162 Pac. 126 (action on promissory

notes); *Stum v. Hadrich*, 7 Cal. App. 241, 94 Pac. 82 (sale of business). And see *Tatum v. Ackerman*, 148 Cal. 357, 113 Am. St. Rep. 276, 7 Ann. Cas. 541, 3 L. R. A. (N. S.) 908, 83 Pac. 151 (declaring that section 1440 of the Civil Code has no application to cases where performance is not yet due upon the part of the party who has previously given notice that he will not perform when such performance is due).

5. *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640; *Tubbs v. DeHillo*, 19 Cal. App. 612, 127 Pac. 514 (delay in payment).

of the contract, the other party, who has not fully performed the act agreed upon, cannot maintain a suit upon the contract, although he may treat it as terminated and sue for the reasonable value of that which he furnished under it.⁶ Nor is a contractor entitled to recover for profits he might have made upon the completion of the work undertaken, when the owner exercises his right, expressly reserved, to terminate the contract at any stage of the work.⁷ And an owner is not responsible to a contractor for acts of another and independent contractor, hindering and delaying his performance before the loss of a building being constructed.⁸

In order to excuse want of performance under subdivision 3 of section 1511 of the Civil Code,⁹ there must not only be an act "intended or naturally tending" to induce an omission to perform or offer to perform, but it must also be shown that the act did in fact induce such omission.¹⁰ And it must be "such an act as, being done in and about some matter not covered by the terms of the agreement, and entirely separate and apart from its terms, would operate to induce the debtor to delay performance of his obligation."¹¹ If one party to an executory contract induces the other to believe that he has withdrawn from the contract, the other party need not wait until the day of performance before making new arrangements, nor does he lose his remedy against the delinquent party by providing at once against losses likely to arise from such delinquency.¹²

6. *Gray v. Bekins*, 62 Cal. Dec. 44, 199 Pac. 767 (citing *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100).

7. *McPherson v. San Joaquin County*, 6 Cal. Unrep. 257, 56 Pac. 802.

8. *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723.

9. Quoted *supra*, § 260.

10. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Sanford v. Savings & Loan Soc.*, 80 Fed. 54.

11. *Rottman v. Hevener*, 36 Cal. App. Dec. 358, per *Finlayson*, P. J.

12. *Ross v. Tabor*, 35 Cal. App. Dec. 726, 200 Pac. 971, per *Finlayson*, P. J. (quoting from *Chamber of Commerce v. Sollitt*, 43 Ill. 519, and citing Civ. Code, §1511, subd. 3).

Section 1193 of the Code of Civil Procedure provides that no act done by the owner in compliance with any of the provisions of the chapter on mechanics' liens shall be held to be a prevention of performance by a contractor.

§ 262. Impossibility Generally.—Where a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by the difficulty of performance, or by the fact that he becomes unable to perform.¹³ If a thing is possible in itself to be done—possible in the nature of things to be done—a positive contract to do it is binding, though the performance is rendered impracticable, or even impossible, by some unforeseen cause over which the promisor had no control, but against which he might have provided in his contract.¹⁴ And the reason of this rule applies as well to a foreseen possible cause over which the party might exercise control.¹⁵ Difficulty or improbability of accomplishing the undertaking will not avail. Except where prevention has been caused by the culpable negligence or other wrongful act of the promisee,¹⁶ it

13. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, L. R. A. 1916F, 1, 156 Pac. 458; *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 Pac. 1085; *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705; *Klauber v. San Diego Street Car Co.*, 95 Cal. 353, 30 Pac. 555. See, also, *supra*, § 259.

14. *Baranov v. Scudder*, 177 Cal. 458, 170 Pac. 1122; *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29 (holding obligation of contractor to complete building not released by reason of landslide causing damage to building); *Potts Drug Co. v. Benedict*, 156 Cal. 322, 25 L. R. A. (N. S.) 609, 104 Pac. 432 (applying rule in action to recover balance due for sale of leasehold where property destroyed by fire before

date of delivery); *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787; *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 Pac. 1085; *Barrere v. Soms*, 113 Cal. 97, 45 Pac. 177, 572; *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705; *Klauber v. San Diego etc. Car Co.*, 95 Cal. 353, 30 Pac. 555. See *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 117 Pac. 934 (holding impossibility of performance neither pleaded nor shown); *California Nat. Bank v. Weldon*, 14 Cal. App. 765, 113 Pac. 334.

15. *Baranov v. Scudder*, 177 Cal. 458, 170 Pac. 1122.

16. *Barrere v. Soms*, 113 Cal. 97, 45 Pac. 177, 572.

must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance.¹⁷ The impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it; or, as it is sometimes said, it must be an *impossibilitas rei* as distinguished from an *impossibilitas facti*.¹⁸ If performance is possible, failure to perform is none the less a breach, although the obligor himself may have become wholly unable to perform.¹⁹ The Civil Code provides that "Everything is deemed possible except that which is impossible in the nature of things."²⁰

§ 263. Legal Prohibition.—Where, by the terms of a contract the promisor agrees to erect a building for a lessee according to specification unless prevented by "causes beyond his control," he is excused from performance both by the terms of the contract, and "by operation of law" under section 1511 of the Civil Code, when he is prevented by lawful city ordinances from erecting the building specified, or any such building which would be adequate for the purposes of the contract. And in an action on the contract by the proposed lessee, the validity of the ordinance as a legislative act cannot be questioned, where nothing is averred in the complaint, *dehors* the ordinance, to show that it is unreasonable, oppressive or void, as applied to the property involved in the contract,

17. *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787; *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 Pac. 1085; *Klauber v. San Diego Street Car Co.*, 95 Cal. 353, 30 Pac. 555.

18. *Potts Drug Co. v. Benedict*, 156 Cal. 322, 25 L. R. A. (N. S.) 609, 104 Pac. 432; *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787; *Tuohy v. Moore*, 133 Cal. 516, 65 Pac. 1107; *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 Pac. 1085; *Fresno Milling Co. v.*

Fresno Canal etc. Co., 126 Cal. 640, 59 Pac. 140; *Klauber v. San Diego Street Car Co.*, 95 Cal. 353, 30 Pac. 555.

19. *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787; *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 Pac. 1085; *Klauber v. San Diego Street Car Co.*, 95 Cal. 353, 30 Pac. 555.

20. Civ. Code, § 1507; *Peterson v. Hubbard*, 2 Cal. Unrep. 607, 9 Pac. 106.

as distinguished from other property in the city to which it is applicable.¹ But the interference by a writ sued out by a private litigant will not excuse performance, although it may deprive the contracting party of the means of performance.² This is not prevention by operation of law within the meaning of the Civil Code. The act is that of an individual, and not that of the government. In a certain sense, it is argued, the property so taken may be in the custody of the law, and yet the seizure may be wrongful, and the suitor held responsible in damages. The law recognizes the fact that private remedies may be wrongfully—that is, illegally—used, and a litigant is required to give security for damage that may be caused if it should be finally decided that his writ was improperly issued.³

§ 264. Act of God or Public Enemy.—On principle it would seem that where a person contracts to do a certain lawful and not impossible thing, neither inevitable accident nor those events denominated acts of God will excuse him for the reason that he might have provided for such contingencies.⁴ But a different rule maintains under the code.⁵ The words “irresistible and superhuman

1. *Collins Hotel Co. v. Collins*, 4 Cal. App. 379, 88 Pac. 292. See, also, *Citrus Soap Co. v. Peet Bros. Mfg. Co.*, 33 Cal. App. Dec. 712, 194 Pac. 715 (holding that in an action for damages for the breach of contract for the sale and delivery of glycerine by plaintiff to defendant, a finding of the trial court that plaintiff's failure to deliver all the glycerine within the time specified by the contract was due to certain quarantine regulations shutting off production will not be disturbed on appeal where it was based on conflicting evidence).

2. *Sample v. Fresno Flume & Irr.*

Co., 129 Cal. 222, 61 Pac. 1085; *Klauber v. San Diego Street Car Co.*, 95 Cal. 353, 30 Pac. 555 (receiver appointed); *Union etc. Paving Co. v. Campbell*, 2 Cal. App. 534, 84 Pac. 305.

For discussion of appointment of receiver as excuse for nonperformance, see notes, 3 A. L. R. 627; 12 A. L. R. 1079.

3. *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 Pac. 1085; *Klauber v. San Diego Street Car Co.*, 95 Cal. 353, 30 Pac. 555.

4. *Law v. San Francisco Gas etc. Co.*, 168 Cal. 112, Ann. Cas. 1915D, 942, 142 Pac. 52.

5. Civ. Code, § 1511.

cause," as used in section 1511 of the Civil Code, which provides in what cases the performance of an obligation is excused, are, it is held, equivalent in meaning to the phrase "act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ.⁶

Although the doctrine in relation to the act of God is, in a proper case, matter of defense, where one is sued for failure to perform a contract, yet when one sues upon a contract and must show performance on his part to entitle him to recover, he cannot rely upon such prevention to show performance. Excuse for not performing, in the nature of things, cannot be performance. A defendant cannot be made to pay for the act of God preventing the plaintiff from rendering an equivalent for the money he seeks to recover. The statute purports simply to provide an excuse for failure to perform.⁷ Nor can the benefit of the rule against responsibility for damages caused by the act of God inure to the benefit of one who could have avoided the damage by complying with his contract.⁸

Act of public enemy—War conditions.—It has been declared that the fact that war conditions render the contemplated means of performance of a contract of sale unavailable will not excuse the sellers from performance where the buyers are ready, willing and able to perform.⁹

6. *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. 244. See *Pope v. Farmers' Union etc. Co.*, 130 Cal. 139, 80 Am. St. Rep. 87, 53 L. R. A. 673, 62 Pac. 384 (declaring that the phrase "damage by the elements" is the equivalent of "act of God"); *Bryan Elevator Co. v. Law*, 31 Cal. App. 216, 160 Pac. 174 (holding provision in contract intended to cover losses by act of God relieved party from loss by fire during earthquake). Section 1511 of the Civil Code is quoted

supra, § 260. See *Act of God*, vol. 1, p. 384, as to particular occurrences which are considered as acts of God.

7. *Remy v. Olds*, 4 Cal. Unrep. 240, 21 L. R. A. 645, 34 Pac. 216.

8. *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708.

9. *Meyer v. Sullivan*, 40 Cal. App. 723, 181 Pac. 847.

For extensive discussion of rights of parties to contracts, the perform-

Similarly, it has been held that the fact that the existence of war conditions rendered it difficult for the promisor to secure materials with which to fulfill his contract will not excuse a breach of the contract; that this clearly is not the act of a public enemy which would serve to excuse the performance under section 1511 of the Civil Code.¹⁰ Where, however, in an action for the breach of a contract for the sale of oil well casing it was shown that the promisor did not guarantee deliveries, but merely promised to do all that was possible to have the goods shipped, and further, that at about the time the contract was executed the United States government had placed large orders for war materials with the only firm from which the particular kind of casing could be procured, which orders had precedence over all other orders from private concerns, and that the promisor did all in its power reasonably, to procure deliveries, it was held that his failure to perform was excused.¹¹

§ 265. Destruction or Nonexistence of Subject Matter Generally.—The California court has adopted as the general rule concerning performance as affected by the destruction or nonexistence of the subject matter of the contract, the following statement:

“Where from the nature of the agreement it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse the performance wholly, or pro tanto, in event of the partial destruction of the thing concerned. Thus where the contract relates to the use or possession or any dealing with specific things and performance necessarily depends on the existence of the particular thing, the condition is implied that the impossibility arising from the perishing or de-

ance of which is interfered with by war conditions or acts of government in prosecution of war, see notes, 3 A. L. R. 21; 9 A. L. R. 1509; 11 A. L. R. 1420.

10. *Dwight v. Callaghan*, 35 Cal. App. Dec. 304, 199 Pac. 838.

11. *Coalinga Mohawk Oil Co. v. R. H. Herron Co.*, 35 Cal. App. Dec. 346, 199 Pac. 813.

struction of the thing, without default in the party, will excuse performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject thereof." ¹²⁻¹³

But when a contract does not belong to the class designated above, and does not contain a provision to a contrary effect, it cannot be maintained that the obligation of the parties to perform is dependent upon the continued existence of the subject matter. Thus the obligation of a promisor to furnish steam is not dependent upon the continued existence of a particular steam plant, there being no provision in the contract to that effect. And when, in such a case, there has been a partial assignment with the

12-13. *Potts Drug Co. v. Benedict*, 156 Cal. 322, 25 L. R. A. (N. S.) 609, 104 Pac. 432 (quoting text from 9 Cyc. 631). Supporting these principles, see *Mineral Park Land Co. v. Howard*, 172 Cal. 289, L. R. A. 1916F, 1, 156 Pac. 458; *Levy v. Caledonian Ins. Co.*, 156 Cal. 527, 105 Pac. 598; *Williams v. Miller*, 68 Cal. 299, 9 Pac. 166; *Wong Ah Sure v. Ty Fook*, 37 Cal. App. 465, 174 Pac. 64; *A. B. Field & Co. v. Haven*, 36 Cal. App. 669, 173 Pac. 108; *Leventritt v. Cowell*, 21 Cal. App. 597, 132 Pac. 627. See, also, note, 12 A. L. R. 1273. And see *H. Hackfeld & Co. v. Castle*, 33 Cal. App. Dec. 177, 61 Cal. Dec. 721, 198 Pac. 1041 (holding that discontinuance of shipping route excused performance, the court declaring: "Its continued existence was therefore, in the absence of any warranty by either party that it would continue in existence, a condition of the contract, within the rule thus stated by Professor Williston, 3 Williston on Contracts, § 1948: 'Not only where a specific thing is itself to be sold or trans-

ferred, but wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes it unavailable, excuses the promisor unless he has clearly assumed the risk of its continued existence. A contract to manufacture goods in a particular factory is discharged by the destruction of the factory; a contract to do work on a specific building is discharged by the destruction of that building; a contract to carry goods by a particular ship is discharged by the loss of the ship; or by such an injury to it as prevents its use within the time permitted by the contract; and a contract to serve or to employ another on a particular ship is subject to the same defense. A contract to move a building is excused by its destruction; a contract to furnish water from a spring by the failure of the spring; a contract to drive logs down a stream by a fall in the water in the stream, owing to which performance becomes impossible").

consent of both parties of a contract to heat three buildings, two of the buildings having been sold, the obligation to furnish heat for the building retained by the assignor still exists, and is not extinguished by a destruction of the buildings sold.¹⁴ Likewise, a contract by the terms of which one party is employed by the other to buy and pack dried fruits in the latter's packing-house is essentially one for the performance of personal services, since the services may be performed as effectively in one place as another, and the destruction of the packing-house by fire will not terminate it.¹⁵

An agreement to take from certain land all the earth and gravel necessary in the construction of a particular work, and to pay for the same at specified rates, ordinarily contemplates that the land contains the requisite quantity, available for use; and performance is excused, it has been held, notwithstanding there was a sufficiency of such materials on the land, if they were so situated that the promisor could not take them by ordinary means, nor except at a prohibitive cost, amounting to ten or twelve times as much as the usual cost thereof.¹⁶ It has been said that events which, happening before the conclusion of a contract, avoid it, either by determining the existence of the subject matter or materially affecting it, do not, properly speaking, terminate the contract, but prevent the contract from arising.¹⁷

§ 266. Destruction of Building Being Erected or Repaired.—Where one agrees to furnish labor and materials for work on an existing building, the property of another, the agreement is upon the implied condition that the building shall remain in existence, and the destruction of it,

14. *Law v. San Francisco Gas etc. Co.*, 108 Cal. 112, Ann. Cas. 1915D, 842, 142 Pac. 52. Howard, 172 Cal. 280, L. R. A. 1916F, 1, 156 Pac. 458.

15. *A. B. Field & Co. v. Haven*, 36 Cal. App. 669, 173 Pac. 108. 17. *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 20, 20 Pac. 382.

16. *Mineral Park Land Co. v.*

without the fault of either party excuses performance by the person supplying such labor, and entitles him to recover the reasonable value of the part performance effected.¹⁸ Although this principle has been contended for in case of the destruction of a building in the course of erection, it clearly has no application where there is an express covenant as to how the loss shall be borne.¹⁹ And in no case can one who undertakes to furnish labor and materials for building of a house or other structure for another for a specified sum, recover on the contract for a partial construction in case the building be destroyed by fire without the fault of either party, unless he is protected against such contingency by the contract.²⁰ In order to entitle the builder to recover, full performance is necessary, unless he has been prevented by the act of the other party, or by operation of law, or by the act of God, or by the public enemy;¹ and fire, it has been declared, is not classified as an act of God.² The rule allowing a recovery for substantial performance is not applicable in such a case.³ Thus, where, by the terms of a building contract, installments of payment for the work are conditioned upon completion according to agreement and specifications, such installments cannot be recovered where the whole work is consumed by fire, before its completion, without apparent fault of either party.⁴ This is particularly true where the

18. *Keeling v. Schastey & Vollmer*, 18 Cal. App. 764, 124 Pac. 445.

19. *Watson v. Alta Investment Co.*, 12 Cal. App. 560, 108 Pac. 48.

20. *Anderson v. Quick*, 163 Cal. 658, 126 Pac. 871; *Keeling v. Schastey & Vollmer*, 18 Cal. App. 764, 124 Pac. 445. See *supra*, § 248.

1. *Keeling v. Schastey & Vollmer*, 18 Cal. App. 764, 124 Pac. 445. See *supra*, §§ 261, 263, 264.

2. *Keeling v. Schastey & Vollmer*, 18 Cal. App. 764, 124 Pac. 445 (citing *Pope v. Farmers' Union & Milling Co.*, 130 Cal. 139, 80 Am. St.

Rep. 87, 53 L. R. A. 673, 62 Pac. 384). See *Act of God*, vol. 1, p. 385.

3. *Watson v. Alta Investment Co.*, 12 Cal. App. 560, 108 Pac. 48. See *supra*, §§ 251, 252, for discussion of rule of substantial performance.

4. *Clark v. Collier*, 100 Cal. 256, 34 Pac. 677 (holding contract to repair old house and build new addition thereto entire, and further that evidence failed to show substantial performance before destruction). And see *Hogan v. Globe Mut. Bldg. etc. Assn.*, 140 Cal. 610, 74 Pac. 153 (order by contractor

contract, providing for the apportionment of losses, states that the contractor must bear the loss of all installments not then due.⁵ But where, by the terms of the contract, it is agreed that in case of the destruction of the property by fire payment shall be made not only for the goods destroyed but for "materials furnished, labor and services rendered" up to that time, the contractor is entitled to recover for materials delivered upon the premises but not installed in place, as well as for the property destroyed.⁶

It seems that a contractor is under the same obligation to continue and complete a building after partial destruction as before.⁷ And, it has been held, a provision for the apportionment of the loss in the event of a partial destruction does not make it incumbent upon the parties, before further work could proceed, to meet and agree upon the extent of the injury to the building and the loss occasioned thereby.⁸ But a contract for leasing a building to be constructed is terminated by the destruction of the building when nearly completed.⁹

upon building and loan association in favor of lumber company for materials furnished to be used in building, which was accepted payable upon completion of building is not payable where building was burned before its completion); *O'Brien v. Garibaldi*, 15 Cal. App. 518, 115 Pac. 249 (order directing owner to pay specific sum to subcontractor not binding on owner where original contractor did not earn payments by completing building).

5. *Watson v. Alta Investment Co.*, 12 Cal. App. 560, 108 Pac. 48.

6. *Roughton v. Brookings Lumber & Box Co.*, 26 Cal. App. 752, 148 Pac. 539.

7. *Gray v. Bekins*, 62 Cal. Dec.

44, 199 Pac. 767 (partial destruction by earthquake); *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29 (building damaged by landslide, danger of which was apparent at time contract was executed). See *Hettinger v. Thiele*, 15 Cal. App. 1, 113 Pac. 121 (holding proper construction of contract containing clause for apportionment of loss in case of total destruction showed parties did not contemplate rebuilding in that event).

8. *Anderson v. Quick*, 163 Cal. 658, 126 Pac. 871.

9. Civ. Code, § 1933; *Leventritt v. Cowell*, 21 Cal. App. 597, 132 Pac. 627. See *BAILMENTS*, vol. 4, p. 36; *LANDLORD AND TENANT*.

§ 267. **Death.**—The general rule is that contracts to perform personal acts are discharged by the death or disability of the person who was to perform the acts.¹⁰ Such cases come, it has been said, under the general principle that where performance depends upon the continued existence of any particular person, and there is no warranty of such continued existence, it is excused if, before a breach of the contract, performance becomes impossible by reason of the death of such person. In contracts of this kind it is an implied condition that death shall dissolve the contract. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person.¹¹ The principal difficulty consists in ascertaining what particular contracts are purely personal, so that the right to enforce them, or the liability springing from them, does not survive after the death of the contracting party.¹² The illustrations ordinarily given of personal contracts on which no liability attaches upon the executor or administrator, unless a breach occurred in the lifetime of the deceased, are, a promise to marry; the contract of a master to instruct his apprentice; of an author to compose a particular work; of a physician or lawyer to render services.¹³ The general rule does not apply, however, where the services are of such a character that they may be as well performed by others; nor where the contract, by its terms, shows that performance by others was contemplated.¹⁴ If an instrument creates a debitum in praesenti, an obligation existing in the lifetime of the obligor, the fact that it is not

10. *Husheon v. Kelley*, 162 Cal. 656, 124 Pac. 231; *Levy v. Caledonian Ins. Co.*, 150 Cal. 527, 105 Pac. 598; *Janin v. Browne*, 59 Cal. 37. See **MASTER AND SERVANT**.

11. 6 *Ruling Case Law*, p. 1009. And see *supra*, § 265.

12. *Estate of Baker*, 170 Cal. 578, 150 Pac. 989.

13. *Janin v. Browne*, 59 Cal. 37.

14. *Husheon v. Kelley*, 162 Cal. 656, 124 Pac. 231; *Janin v. Browne*, 59 Cal. 37.

to be discharged until after the latter's death renders it none the less enforceable as a demand against his estate.¹⁵

§ 268. Pleading Excuse.—While a sufficient excuse for nonperformance often confers upon a party the same rights that he would have had upon performance, the distinction between the two remains a substantial one.¹⁶ The rule is fundamental that the complaint in an action must allege either performance or a valid excuse for nonperformance. One is not the same as the other. And if a party did not perform, but relies upon an excuse, he must set forth the excuse in his complaint.¹⁷ To render such excuse available, the complaint must aver both the failure of complete performance and the excuse.¹⁸ So, too, in an action for the breach of a contract, matters which fall within the category of excuses for nonperformance and which are not apparent on the face of the contract, nor embraced within the facts alleged in the complaint, are matters of defense, and, to be available, must be set up by answer, and where they are not, they cannot be advanced in support of an appeal, or as a reason why a new trial should not have been granted.¹⁹ It necessarily follows that evidence of an excuse will not support a finding that a party has performed.²⁰ And it has been

15. *Patterson v. Chapman*, 179 Cal. 203, 2 A. L. B. 1467, 176 Pac. 37; *Buehtel College v. Chamberloix*, 3 Cal. App. 246, 84 Pac. 1000; *Janin v. Browne*, 59 Cal. 37. See EXECUTORS AND ADMINISTRATORS.

16. Civ. Code, § 1512; *Estate of Warner*, 158 Cal. 441, 111 Pac. 352.

17. *Herdal v. Sheehy*, 173 Cal. 163, 159 Pac. 422 (contractor for building on a specified tract belonging to owner, who erects it partly on such land cannot, in an action to foreclose a lien on the land, take advantage of an excuse from performing according to the terms of

the contract, where his complaint declares on the theory of full performance); *Estate of Warner*, 158 Cal. 441, 111 Pac. 352; *Daley v. Russ*, 36 Cal. 114, 24 Pac. 867; *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723; *Poheim v. Meyers*, 9 Cal. App. 31, 98 Pac. 65. And see *infra*, § 285.

18. *Herdal v. Sheehy*, 173 Cal. 163, 159 Pac. 422.

19. *Eucalyptus Growers Assn. v. Orange County N. & Land Co.*, 174 Cal. 330, 163 Pac. 45.

20. *Estate of Warner*, 158 Cal. 441, 111 Pac. 352.

declared that the rule that a plea of performance is not sustained by proof of excuse from performance is inapplicable where the plaintiff who was the only witness on the subject, consistently claimed that he had performed his contract and at no time admitted nonperformance and excuse.¹

Breach.

§ 269. **Generally.**—In the obligation assumed by a party to a contract is found his duty, and his wrongful failure to comply with the duty constitutes a breach.² The refusal of a party to do that which he has agreed and is required to do is tantamount to a breach of his contract.³ Even partial breach ordinarily gives rise to a cause of action for damages.⁴ Where the contract is entire, a breach of part is a breach of the whole, and discharges the party complaining of it from the performance of any of the conditions on his part, and gives him a complete right of action.⁵ Where a contract is severable and

1. *Mills v. Geo. A. Moore & Co.*, 39 Cal. App. 94, 178 Pac. 304.

2. *Woodruff Co. v. Exchange Realty Co.*, 21 Cal. App. 607, 132 Pac. 598; 6 Ruling Case Law, p. 1016; *Manning v. Broadmoor Imp. Co.*, 30 Cal. App. 112, 157 Pac. 524 (building contract).

Liability of one promising to do some act without compensation for failure to perform promise, see note, 4 A. L. R. 1196.

3. *Minaker v. California Canneries Co.*, 138 Cal. 239, 71 Pac. 110; *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635 (nonpayment of installments due contractor); *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146 (nonpayment of installments due contractor); *Williams v. Parrott & Co.*, 31 Cal. App. 73, 159 Pac.

824; *Puritas Laundry Co. v. Green*, 15 Cal. App. 654, 115 Pac. 660; *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379; *Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 252, 90 Pac. 51. See, also, *Bradley v. Anglo-American Gas Control Co.*, 102 Cal. 627, 36 Pac. 1011 (holding agreement for exclusive agency with one firm violated by agreement with rival firm).

See supra, § 239, as to performance of conditions; infra, §§ 273, 274, as to anticipatory breach of contract.

4. *Turner v. Howze*, 28 Cal. App. 167, 151 Pac. 751.

5. *Dunn v. Daly*, 78 Cal. 640, 21 Pac. 377; *Haskell v. McHenry*, 4 Cal. 411; *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. 409; *Alderson v. Houston*, 154 Cal. 1, 90 Pac.

divisible so that a full performance of one part may be made by both parties without affecting the subsequent performance or right of performance as to the remainder, there may be a recovery for a breach of the part thus severable.⁶ Of course, the party who first violates a contract cannot complain of later violation by the other party⁷ in the absence of a waiver of the first breach.⁸

Fraud does not include mere breach of contract.⁹ And false representation cannot be predicated on a mere promise unless the promise is made with no intent to perform.¹⁰ However, fraud may be so ingrained with breach of contract that an action, as regards the bar of the statute of limitations, at least, must be treated as one for relief on the ground of fraud.¹¹

It is the duty of the court to restrain contracting parties from violating the spirit as well as the letter of their agreement.¹² But great care should be exercised to prevent the liability of a party from being extended beyond the terms of his contract. If one contracts to make merchantable lumber for another, and the other takes away

884; *De Prosse v. Royal Eagle Distilleries Co.*, 135 Cal. 408, 67 Pac. 502; *Mankins v. Forward Movement Syndicate*, 28 Cal. App. 285, 152 Pac. 313. As to entire and divisible contracts, see *supra*, § 191.

6. *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 Pac. 325; *Turner v. Howze*, 28 Cal. App. 167, 151 Pac. 751 (quoting from *Ruling Case Law*).

7. *Los Angeles Gas etc. Corp. v. Amalgamated Oil Co.*, 168 Cal. 140, 142 Pac. 46 (sale of oil); *Pierce v. Lukens*, 144 Cal. 397, 77 Pac. 996; *San Francisco Bridge Co. v. Dumbarton Land etc. Co.*, 119 Cal. 272, 51 Pac. 335; *Johnson v. Moss*, 5 Cal. 515; *Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 252, 90 Pac. 51.

8. See *infra*, § 275, as to waiver of breach.

9. *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984; *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382. See FRAUD AND DECEIT.

10. *Matteson v. Wagoner*, 147 Cal. 739, 82 Pac. 436 (applying rule in action by mortgagee to rescind loan secured by mortgage); *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382.

11. *Gregory v. Spieker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576. See LIMITATION OF ACTIONS.

12. *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973.

unmerchantable lumber, contrary to the wish and orders of the maker, this is not a breach of the contract on the part of the manufacturer.¹³ And an agreement to pay as a commission for services in procuring a contract for the cutting and removal of timber from the land of another, a certain amount for each thousand feet of lumber removed, is not a contract to cut any timber, and there is no breach of contract where no timber is cut.¹⁴ Likewise, a party to a contract may absolutely limit his right to receive a sum of money to be paid him thereunder to money derived by the other party from a certain source, and in such a case, where the other party continues diligently to endeavor to derive such money from the specified source, recovery can be had only as it is so derived.¹⁵ Nor is an agreement to execute a lease broken by a refusal to execute one which imposes terms and conditions not imposed by law and of which no mention was made in the instrument.¹⁶ It has been held that a covenant not to sue is no bar to an action, but the defendant therein must rely upon the covenant for his remedy.¹⁷

In an action for a breach of contract, it is a question of fact for the jury to determine whether or not the plaintiff had performed on his part all that is requisite.¹⁸ Ordinarily, a breach of contract must be deemed to have taken place where performance was to have been made.¹⁹

13. *Hale v. Trout*, 35 Cal. 229.

14. *Woodard v. Glenwood Lumber Co.*, 174 Cal. 568, 163 Pac. 1017. See LOGS AND TIMBER.

15. *Lynch v. Keystone Con. Min. Co.*, 163 Cal. 690, 126 Pac. 968.

16. *Levin v. Saroff*, 36 Cal. App. Dec. 214.

17. *Howland v. Marvin*, 5 Cal. 501.

18. *Sanford v. East Riverside Irr. Dist.*, 101 Cal. 275, 35 Pac. 865.

19. *Ivey v. Kern County Land*

Co., 115 Cal. 196, 46 Pac. 926. See CORPORATIONS. See supra, § 215, and the article on CONFLICT OF LAWS, vol. 5, p. 452, as to place of performance of contracts. See, also, *Byrum v. Stockton etc. Works*, 91 Cal. 157, 27 Pac. 1093 (holding that where a machine is sold with a guaranty as to performance and fails to perform satisfactory work, the breach of the guaranty occurs at the time and place of delivery and sale and not at the place where it failed to perform).

§ 270. **Contracts in Restraint of Trade.**—When persons make void contracts in restraint of trade they must rely upon the good faith of those with whom they deal for their performance, and, that failing, they are denied all redress.²⁰ The maxim “*Ex turpi causa non oritur actio*” applies to prevent an action to enforce a void contract in restraint of trade by injunction to restrain the defendant from engaging in business contrary to the terms of such void contract.¹ Thus there can be no recovery for breach of an agreement not to carry on a particular business where the restricted territory is greater in extent than permitted by statute, and the rival business is set up within a portion of the described territory excluded from the operation of the contract by the statute.² But where a contract in restraint of trade is partly or wholly valid, it will be enforced to the extent to which it is valid, in the same manner as any other contract,³ and a breach will be enjoined, even though only nominal damages can be proven.⁴ The right to enforce such a covenant does not depend upon any showing of the actual loss of customers, since they might, in any event, have discontinued their patronage, but it is sufficient that the facts alleged justify the conclusion of the court therefrom that injury would

20. *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*, 184 Cal. 21, 192 Pac. 847; *Hill v. Kidd*, 43 Cal. 615. See *supra*, § 92 et seq., for general discussion of contracts in restraint of trade.

1. *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468.

2. *Fanz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; *Gregory v. Spieker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576; *DuBois v. Padgham*, 18 Cal. App. 298, 123 Pac. 207 (holding complaint did not state cause of action against retiring partner for breach of contract not to engage in business).

3. *Gregory v. Spieker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576 (holding contract not to manufacture or sell designated bitters is broken by sale of same bitters under another name, especially if vendor represents to his customers that bitters which he manufactures and sells are superior to bitters which he has thus sold right to manufacture and sell); *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388; *Akers v. Rappe*, 30 Cal. App. 290, 158 Pac. 129 (holding facts showed breach).

4. *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 978.

probably result from the acts of the breaching party and that such injury would be irreparable.⁵ Evidence is admissible which tends to show that articles sold in a business are not a part of the inhibited business, but are articles of general merchandise, and hence that there has been no breach of contract.⁶

It has been declared that a decree enjoining breach of a contract not to engage in a rival business for a period of three years should not purport to enjoin the carrying on of the rival business for the space of three years from the date of the contract, "or so long as plaintiffs, or anyone deriving title to the goodwill of the business carry on said business," but it should read: "So long as plaintiffs, or anyone deriving title to their business, shall carry on said business, not exceeding three years," from the date of the contract.⁷

§ 271. Prevention of Performance Generally.—Prevention implies, *ex vi termini*, a breach of contract, and, of course, a party cannot commit a breach by exercising a right secured to him by the contract.⁸ But the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach for which an action will lie.⁹ And a person having agreed to make payment within a stated time after the happening of an event, cannot, by refusing to permit that event to occur, escape liability upon his contract.¹⁰ Moreover, prevention of performance by the promisee is equivalent to performance by the promisor so far as rights to be ob-

5. *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973, per Shaw, J.

6. *Prior v. Diggs*, 3 Cal. Unrep. 565, 31 Pac. 155.

7. *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662. Recovery of damages for breach of contract in restraint of trade, see DAMAGES.

8. *Cox v. McLaughlin*, 63 Cal. 196.

9. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Blair v. Brownstone Oil & Refining Co.*, 35 Cal. App. 394, 170 Pac. 160. See *supra*, §§ 260, 261, as to prevention as excuse for nonperformance.

10. *Taylor v. Simi Constr. Co.*, 23 Cal. App. 308, 137 Pac. 1095.

tained thereunder are concerned.¹¹ Section 1512 of the Civil Code provides that;

“If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.”¹²

A mere refusal to perform, however, does not in all cases call for the application of section 1512 of the Civil Code. In some cases of bilateral contracts a refusal on the part of one party to perform has been held to amount to a prevention of performance by the other party. But where the contract is unilateral, the party to whom the promise is made cannot recover without proof of performance of the condition upon which the promise depends; and in such a case a mere refusal by the promisor to perform, or even an entire repudiation by him, does not of itself amount to prevention.¹³ Breaches amounting to prevention must be of conditions precedent.¹⁴

§ 272. Building and Construction Contracts.—A contractor for the erection of a building who has performed in good faith all the conditions of the contract on his part and is prevented by the wrongful acts of the owner from completing the building, may maintain an action for his damages.¹⁵ A failure by the owner to furnish proper materials with which to prosecute the work contracted for, it has been held, constitutes a prevention entitling the

11. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (real estate brokerage contract); *Long v. Saufley*, 79 Cal. 260, 21 Pac. 757; *Id.*, 89 Cal. 437, 26 Pac. 902.

12. *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 Pac. 989 (construction of pipe-line); *Frese v. Moore*, 1 Cal. App. 587, 82 Pac. 542; *Carlson v. Sheehan*, 157 Cal. 692, 100 Pac. 29 (building contract).

13. *Mattingly v. Pennie*, 106 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

14. *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146. See *supra*, § 239, as to performance of conditions.

15. *Gamache v. South School District*, 133 Cal. 145, 65 Pac. 301; *Rousseau v. Cohn*, 20 Cal. App. 469, 129 Pac. 618.

contractor to recover the profits he would have realized by completing the contract.¹⁶ And an interference with the contractor by the owner's unauthorized occupation of an uncompleted building is such a prevention as to amount to a breach.¹⁷ However, in the nature of building operations, when the different classes of work are being done by different contractors, it has been observed that it often happens that one contractor must wait until the work of another has been done, and delays arising from such cause are not a prevention or in any sense a delay for which the owner is chargeable.¹⁸ And where contract is entire and consideration to be paid in installments as work progresses, mere failure to pay installments when due is not such prevention of performance as entitles the contractor to sue for whole contract price, unless such payment is made a condition precedent to the further prosecution of the work.¹⁹ It is true that the failure to make such payments may leave the other party without the means or credit to go on and complete the work; but such is not the necessary result of such a failure, and, it has been declared, the court cannot safely adopt, as a conclusion of law, that it does prevent the party from continuing.²⁰

Averment and proof of prevention are essential to a recovery where there is no pretense of the work contracted for having been completed or the contract rescinded.¹ Where a contractor swears to an offer to commence work, he is entitled to prove facts tending to show how he was prevented from performing, and for that purpose may

16. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929 (construction of tunnel). Holding to the contrary, see *Barrett v. Austin*, 3 Cal. Unrep. 551, 31 Pac. 3.

17. *Gray v. Bekins*, 62 Cal. Dec. 44, 199 Pac. 767.

18. *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723.

19. *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Cox v. McLaughlin*, 63 Cal. 196. See *Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 514 (contractor given option to declare default in payment a prevention by owner of performance of contract).

20. *Cox v. McLaughlin*, 54 Cal. 605.

1. *Cox v. McLaughlin*, 63 Cal. 196.

testify to a message delivered to him by the foreman of defendant.²

§ 273. Anticipatory Breach in General.—The principle is elementary that if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for the performance has not expired.³ Where the agreement is to pay a sum out of money derived from a certain source, such as from the profits derived from the occupation and use of land,⁴ or from the carrying on of a business,⁵ and the debtor transfers such land or business, and thus voluntarily puts it out of his power to make any profits, he breaks his contract, and is immediately liable for the indebtedness. Even in the absence of an express provision to use reasonable diligence to obtain the money by means of which the payment is to be made, such a provision may be implied, and failure to observe it may result in entitling the other party to recover, independent of the condition.⁶

2. *Biggerstaff v. Briggs*, 2 Cal. Unrep. 339, 4 Pac. 371.

3. *Carter v. Rhodes*, 135 Cal. 46, 66 Pac. 985; *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117; *Garberino v. Roberts*, 100 Cal. 125, 41 Pac. 857; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Wolf v. Marsh*, 54 Cal. 228; *Hale v. Trout*, 35 Cal. 229; *Etienne v. Etienne*, 42 Cal. App. 441, 183 Pac. 689; *Ratzlaff v. Trainor-Desmond Co.*, 41 Cal. App. 586, 183 Pac. 269 (action for recovery of real estate broker's commissions); *Cabrera v. Payne*, 10 Cal. App. 675, 103 Pac. 176. See *Sharp v. Bowie*, 142 Cal. 462, 76 Pac. 62 (holding renewed and continued prosecution of action to quiet title not inconsistent with promisor's

ability to perform contract to dismiss and quitclaim upon payment of purchase money). See *infra*, § 274, as to repudiation as breach.

4. *Carter v. Rhodes*, 135 Cal. 46, 66 Pac. 985; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Wolf v. Marsh*, 54 Cal. 228.

5. *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117.

6. *Lynch v. Keystone Consol. Min. Co.*, 163 Cal. 690, 126 Pac. 968 (but holding no default by promisor). See *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 88 Pac. 920 (in this case the contract expressly provided that reasonable diligence was to be exercised, and the court found that there was a failure to do so).

Under a note payable out of the profits of a business, the payment of which is originally guaranteed in accordance with its conditions, the liability both of the maker and of the guarantors becomes fixed and absolute, when the maker voluntarily puts it out of his power to make any profit out of the business, or to fulfill the contract according to its terms, by a sale and conveyance of the business.⁷ It is held, however, that the conveyance by a vendor of land contracted for, to a third party, before the time of performance of the contract of sale is not necessarily a breach of that contract. It does not follow from such a transfer that the vendor has put it out of his power to comply with the terms of his contract. The promisee's rights may be expressly reserved under the conveyance.⁸

§ 274. Repudiation.—Where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his conduct shows that he has renounced it and no longer considers himself bound, there is, in legal effect, a prevention of performance by the other party. In such a case it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by conduct which clearly evinces that that determination had been reached and is being acted upon.⁹ And a refusal to accept per-

7. *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117.

8. *Heden v. Point Reyes Land Co.*, 61 Cal. Dec. 225, 196 Pac. 44; *Brimmer v. Salisbury*, 167 Cal. 522, 140 Pac. 30; *Royal v. Dennison*, 109 Cal. 558, 42 Pac. 39; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857; *Shively v. Semi-Tropic Land & Water Co.*, 99 Cal. 259, 33 Pac. 848; *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320. See *VENDOR AND PURCHASER*.

9. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (quoting from *Lake Shore etc. Ry. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773); *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006; *Peloian v. Waldman*, 34 Cal. App. Dec. 45, 201 Pac. 344; *Ross v. Tabor*, 35 Cal. App. Dec. 726, 200 Pac. 971 (In this case the court quotes from *Ga Nun v. Palmer*, 202 N. Y. 483, 36 L. R. A. (N. S.) 922, 96 N. E. 99, to the

formance of a contract before the arrival of the time for performance is the equivalent of a refusal to perform, if not withdrawn before the time for performance.¹⁰

It would seem, however, that a mere declaration of the party of an intention not to be bound, or conduct in repudiation of the contract, will not of itself amount to a breach, so as to create an effectual renunciation of the contract, for one party cannot by any act or declaration destroy the binding force and efficacy of the contract.¹¹ The real operation of a declaration of intention not to be bound appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen* and, holding fast to the contract, to wait till the time for performance has arrived, or to act upon the declaration, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered.¹² If he elects to pursue the latter

effect that "when the contract is wholly executory, there must be some express and absolute refusal to perform or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie; whereas, by a partially executed contract, the breach may result from a failure to perform some of the provisions of the contract. But in either case, after a breach by one party, the rights of the other party and his remedies are the same as to the unexecuted provisions of the contract"); *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265; *Glass v. Glass*, 4 Cal. App. 604, 88 Pac. 734. And in this connection see section 1440 of the Civil Code, to the effect that when notice has been given by one party to an obligation to the other, before

the latter is in default, that he will not perform, and the notice is not withdrawn before performance is due, the latter may enforce the obligation without performance or offer of performance.

10. Civ. Code, § 1515; *Howard v. Galbraith*, 13 Cal. App. 373, 109 Pac. 889.

11. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (quoting from *Lake Shore etc. Ry. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773); *Main St. etc. R. R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937; *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265.

12. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884; *Rauer's Law & Collection Co. v. Harrell*, 32 Cal. App. 45, 162 Pac. 125; *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265.

course, it becomes a breach of contract, excusing performance on his part and giving him an immediate right to recover upon it as such.¹³

Upon election to treat the renunciation, whether by declaration or by conduct, as a breach, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining an action for the recovery of damages.¹⁴ But in order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal and absolute. A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient.¹⁵ And

13. *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 186 Pac. 356; *Liver v. Mills*, 155 Cal. 459, 101 Pac. 299; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (quoting from *Lake Shore etc. Ry. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773); *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006; *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857; *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266; *Sheplar v. Green*, 96 Cal. 218, 31 Pac. 42; *Hale v. Trout*, 35 Cal. 229; *Tomboy Gold & Copper Co. v. Marks*, 61 Cal. Dec. 394, 197 Pac. 94; *Madison v. Weyl-Zuckerman & Co.*, 32 Cal. App. Dec. 662, 192 Pac. 110; *Starkey v. Parker*, 30 Cal. App. Dec. 453, 186 Pac. 195; *Lompoc Produce etc. Co. v. Browne*, 41 Cal. App. 607, 183 Pac. 166; *Butterfield v. Harris*, 20 Cal. App. 471, 129 Pac. 614; *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 632, 112 Pac. 892; *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265; *Cabrera v. Payne*, 10 Cal.

App. 675, 103 Pac. 176; *Stum v. Hadrich*, 7 Cal. App. 241, 94 Pac. 82; *Sierra Land etc. Co. v. Bricker*, 3 Cal. App. 190, 85 Pac. 665; *Stanton v. Singleton*, 6 Cal. Unrep. 129, 54 Pac. 587.

14. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (quoting from *Lake Shore etc. Ry. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773); *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265; *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820.

15. *Hogue-Kellogg Co. v. Petit*, 32 Cal. App. Dec. 834, 192 Pac. 113 (holding statements made did not constitute, as matter of law, anticipatory breach); *Rauer's Law & Collection Co. v. Harrell*, 32 Cal. App. 45, 162 Pac. 125 (quoting *Ruling Case Law*). And see *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. 409, and *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 29 L. R. A. (N. S.) 213, 106 Pac. 404, to the effect that a refusal to pay amounts to a repudiation.

though the parties may abandon a contract by matter in pais, still the acts and conduct which may be relied on to constitute the abandonment must "be clearly proved, and they must be positive, unequivocal and inconsistent with the existence of a contract."¹⁶ One who repudiates his contract without cause cannot thereafter recover for benefits conferred upon the other party unless the latter elects to rescind.¹⁷

A contract may be repudiated as to a part or as to the whole.¹⁸ The repudiation of part of an entire contract may, of course, be treated as a repudiation of the whole.¹⁹ The question as to whether a contract has been abandoned by one party is a mixed one, of law and fact.²⁰

Contract fully performed on one side.—The rule applicable to the repudiation of contracts not fully performed on either side, upon the refusal of further performance by one party, and a right of action then accruing for damages for breach in favor of the other party, has no application to a contract for work fully performed on one side, which is to be paid for in installments by the other party; and notwithstanding a failure to pay any one of such installments, the contractor cannot treat the contract for payment by installments as repudiated or rescinded, and demand payment in full, contrary to the terms of the contract.¹

16. *Ross v. Tabor*, 35 Cal. App. Dec. 726, 200 Pac. 971.

17. *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109; *Tomboy Gold & Copper Co. v. Marks*, 31 Cal. App. Dec. 424, 61 Cal. Dec. 394, 197 Pac. 94. See *supra*, § 230 et seq., as to rescission of contracts. And see CANCELLATION OF INSTRUMENTS.

18. *De Proasse v. Royal Eagle*

Distilleries Co., 135 Cal. 408, 67 Pac. 502.

19. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884; *De Proasse v. Royal Eagle D. Co.*, 135 Cal. 408, 67 Pac. 502; *Haskell v. McHenry*, 4 Cal. 411. As to what contracts are entire or divisible, see *supra*, § 191.

20. *Ross v. Tabor*, 35 Cal. App. Dec. 726, 200 Pac. 971.

1. *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006.

§ 275. **Waiver of Breach.**—One party to a contract may waive a breach by the other either expressly or by conduct.² Thus, although the repudiation of part of an entire contract is a repudiation of the whole, where there is a partial breach of a contract susceptible of more or less performance, the injured party may continue to carry out the contract, waiving the breach,³ or reserving to himself a right of action for such damages as he may have sustained by the partial breach.⁴ And the defaulting party has no right to insist as a condition of completing the work that the other shall waive his claim for damages. A refusal to complete the work, except on that condition, is a refusal to perform.⁵

Where time is made of the essence of a contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of the rent or other moneys after they are due, with knowledge of the facts, such conduct is regarded as creating a temporary suspension of the right of forfeiture, which can only be restored by giving a definite and specific notice of an intention to enforce it.⁶ Where an obligation is a continuing one, it is held that the fact that the promisee may have waived a breach up to a given time does not preclude him from asserting a subsequent breach.⁷ But when an entire contract for hauling all the freight of a merchant for a fixed period was broken by the teamster, a payment according to the terms of the contract for freight actually hauled, it was held, was not such a waiver or condonation of the breach as would prevent the merchant from refusing to give the teamster further freight.⁸

2. See *supra*, § 257, as to waiver of strict performance.

3. *De Prose v. Royal Eagle D. Co.*, 135 Cal. 408, 67 Pac. 502.

4. *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952.

5. *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.

6. *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751. See *LANDLORD AND TENANT; VENDOR AND PURCHASER*.

7. *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951.

8. *Dunn v. Daly*, 78 Cal. 640, 21 Pac. 377.

Where a contract is made with the owner of land to erect a building thereon, and there is a breach, by the contractor, of his covenant to build it in a good and workmanlike manner; neither the occupation of the house by the owner, after its supposed completion, nor the payment of the price, though accompanied by knowledge by the owner of the defective construction, is sufficient, taken alone, to operate as a waiver of the breach of the covenant. This rule is applicable to the case of an agreement by the owner of land to erect for his vendee, in a good and workmanlike manner, a dwelling-house thereon, and thereafter to convey the house and lot to him upon payment of the purchase price. The buyer may sue on the covenant at once, whether the installments of the price are due or not due. The payments on the price, whether in part or in full, voluntary or involuntary, will not operate as a waiver of his demand for damages, unless the circumstances show an intent to waive the same, or create an estoppel against the subsequent assertion thereof.⁹ And it has been held that the fact that a contractor continues work after default of the owner does not affect his right to cease work upon continued nonpayment. He has the right to rely for a reasonable time upon the promises of the owner to pay.¹⁰

Actions for Breach.

§ 276. Remedies in General.—The subject of contracts is so broad that it necessarily touches remedial law at many points. Accordingly, there is no attempt in this treatment of actions for breach of contract to do more than to state some of the general principles governing pleading and practice, showing their peculiar applica-

9. Leonard v. Home Builders, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151. See supra, § 258, as to acceptance as waiver of defects and objections as to performance.

10. San Francisco Bridge Co. v. Dumbarton Land etc. Co., 119 Cal. 272, 51 Pac. 335.

tion to contracts.¹¹ Some reference has already been made, in the preceding sections of this article, to the remedies of one who has been injured by a breach of contract.¹² In certain cases, the equitable remedy of specific performance is available.¹³ Where a contract has been fully executed on one side, and nothing remains to be done except the payment of money by the other party, the party who has performed may declare upon the contract or upon a common count.¹⁴ If, however, one party to a contract has not actually prevented performance but has merely committed a breach of the contract, after partial performance, the other party cannot maintain a suit upon the contract as for a full performance, although he may treat the contract as terminated and sue for the reasonable value of that which he furnished under the contract.¹⁵ In the event of a prevention of performance whether by repudiation or otherwise, the injured party has an election to pursue any of three remedies. He may treat the contract as rescinded and recover in assumpsit in so far as he has performed.¹⁶ Or, he may keep the contract alive for the

11. See ABATEMENT AND REVIVAL, vol. 1, p. 17; ACTIONS, vol. 1, p. 303; ASSUMPSIT, vol. 3, p. 372; ELECTION OF REMEDIES; EVIDENCE; LIMITATION OF ACTIONS; PLEADING; TRIAL, and other particular articles.

12. See as to results of election to rescind, *supra*, § 233. As to joinder of causes of action arising out of contract, see ACTIONS, vol. 1, p. 352.

13. *Glock v. Howard etc. Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713. See SPECIFIC PERFORMANCE. See, also, SALES; VENDOR AND PURCHASER.

14. *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127. See ASSUMPSIT, vol. 3, p. 384.

15. *Gray v. Bekins*, 62 Cal. Dec.

44, 199 Pac. 767; *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100.

16. *Gray v. Bekins*, 62 Cal. Dec. 44, 199 Pac. 767; *House v. Piercy*, 181 Cal. 247, 183 Pac. 807; *Lemle v. Barry*, 181 Cal. 1, 183 Pac. 150; *Walsh v. Standart*, 174 Cal. 807, 164 Pac. 795; *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Alderson v. Houston*, 154 Cal. 12, 96 Pac. 884; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; *Meyer v. Parsons*, 129 Cal. 653, 62 Pac. 216; *Glock v. Howard etc. Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; *Adams*

benefit of both parties, being at all times ready and able to perform.¹⁷ Or, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing, or for such other damages as he is entitled to. In the last case the contract would be continued in force for that purpose.¹⁸ And, of course, in the last case, the injured party need not sue immediately, but may wait until the expiration of the time for performance by the other.¹⁹ But, under

v. Burbank, 103 Cal. 646, 37 Pac. 640; *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; *Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 677, 34 Pac. 497; *Joyce v. White*, 95 Cal. 236, 30 Pac. 425; *Condley v. Consol. Lumber Co.*, 35 Cal. App. Dec. 299, 200 Pac. 69; *Ross v. Tabor*, 35 Cal. App. Dec. 726, 200 Pac. 971; *Murray v. Cal. Conserving Co.*, 33 Cal. App. Dec. 365, 193 Pac. 959; *Haub v. Coustette*, 31 Cal. App. 424, 160 Pac. 836; *Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 514; *Pinkiert v. Kornblum*, 5 Cal. App. 522, 90 Pac. 969. See *supra*, § 233, as to results of election to rescind.

Assumpsit is a form of action on contract, sustainable where there has been an express contract, or where the law will imply a contract; *County of San Luis Obispo v. Gage*, 139 Cal. 398, 73 Pac. 174. See *ASSUMPSIT*, vol. 3, p. 373; *MONEY RECEIVED; WORK, LABOR AND MATERIALS*.

See *VENUE* as to place of trial of action for breach of contract.

17. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; *Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 677, 34 Pac. 497; *Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 514.

18. *House v. Piercy*, 181 Cal. 247,

183 Pac. 807; *Lemle v. Barry*, 181 Cal. 1, 183 Pac. 150; *Walsh v. Standart*, 174 Cal. 807, 164 Pac. 795; *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 169; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; *Meyer v. Parsons*, 129 Cal. 653, 62 Pac. 216; *Glock v. Howard etc. Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; *Temple St. Cable Ry. v. Hellman*, 103 Cal. 634, 37 Pac. 530 (holding further that promisee had election to sue on bond of promisor); *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; *Fountain v. Semi-Tropic Land etc. Co.*, 99 Cal. 677, 34 Pac. 497; *Hale v. Trout*, 35 Cal. 229; *Rousseau v. Cohn*, 20 Cal. App. 469, 129 Pac. 618; *Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 514; *Pinkiert v. Kornblum*, 5 Cal. App. 522, 90 Pac. 969.

19. *Ross v. Tabor*, 35 Cal. App. Dec. 726, 200 Pac. 971 (holding further that in order to hold on to the contract as prospectively binding upon both parties, so that a right of action for damages might accrue to him on the expiration of the time for complete performance by promisor, it was not necessary

established rules, there must be an election of the remedy to be pursued. A party cannot at one and the same time set up a contract, and deny its existence.²⁰

However, regardless of whether a contract may be treated by the injured party as terminated by the breach, the breach of a contract gives rise to a cause of action.¹ And, it has been declared, an action lies for the breach of a contract, though no actual damages be sustained.² Where two persons made an agreement to form a partnership, but such partnership was never launched, and one of the parties proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other, and repudiating the partnership agreement, it was held that an action by the latter to establish his right as a partner, and for an accounting, would not lie—his only remedy in such case being an action at law for breach of contract.³

Injunction as remedy for breach.—There is conflict among the decisions in other jurisdictions as to whether one party is entitled to an injunction to restrain the violation by the other party of a negative covenant of his contract. But in California the question was put at rest at the time of the adoption of the Civil Code by the terms of subdivision 5 of section 3423 (since incorporated in the Code of Civil Procedure, section 526), which provides: "An injunction cannot be granted. . . . 5. To prevent the breach of a contract, the performance of which would not be specifically enforced."⁴ So, too, there is a presumption

that the promisee should permit property belonging to him and deserted by the former to continue abandoned and deprived of all suitable care).

20. *House v. Piercy*, 181 Cal. 247, 183 Pac. 807; *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; *Eulmele v. Los Angeles Investment Co.*, 34 Cal. App. Dec. 533, 196 Pac. 923; *Murphy v. Hellman Com. Trust*

& Savings Bank, 30 Cal. App. Dec. 193, 185 Pac. 485. See *supra*, § 233, as to results of election to rescind.

See, also, ELECTION OF REMEDIES.

1. 6 Ruling Case Law, § 389.

2. *McCarty v. Beach*, 10 Cal. 461.

3. *Powell v. Maguire*, 43 Cal. 11.

4. *Anderson v. Neal Institutes Co.*, 37 Cal. App. 174, 173 Pac. 779 (holding that an injunction would not lie to prevent the breach of a contract

that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation, and where the breach of a contract to transfer personal property can be thus compensated, an injunction cannot be granted to prevent the breach.⁵ It has been held that a party to a contract, by electing to sue for an injunction against the violation of such contract, is not estopped from maintaining a subsequent action for its breach.⁶

§ 277. Contract to Pay in Specific Articles.—Reference has been made to a line of decisions in other states holding that where one contracts an indebtedness and it is agreed that he shall or may pay by delivering specific property, and fails to deliver or tender it, he may be sued for the amount of the indebtedness or for damages for the breach of the contract to deliver. And where, by the terms of the contract, the promisor has an option to pay in specific chattels and does not exercise his option, the law holds he is bound to pay in money. On the other hand, where he has agreed at all events, without any option on his part to deliver specific property in payment of a money debt, and he fails to carry out his contract, he is liable in damages for the value of the property. But the California court has ruled that these principles do not apply where there is no contract, express or implied, to pay a sum of money. For example, where the contract is to accept stock as compensation for services in making a sale of other stock, the promisee, upon a failure of the promisor to deliver the stock, has no cause of action upon an indebtedness, but only an action for damages for a breach of the contract. Such a contract should not be changed by a judgment into an obligation to pay for such

requiring a medical institute company to prepare and furnish medicines and advertising literature and to give plaintiff the exclusive right to use the remedies). See INJUNCTION.

5. *Emirzian v. Asato*, 23 Cal. App.

251, 137 Pac. 1072 (citing Civ. Code, § 3387, and Code Civ. Proc., § 526, subds. 4, 5).

6. *Ahlers v. Smiley*, 163 Cal. 200, 124 Pac. 827.

services in money, unless, without legal justification, the defendants have refused to deliver the stock.⁷

§ 278. Parties Plaintiff.—As a general rule, contracts are enforceable only by the parties thereto, and strangers cannot sue upon them even on behalf of the real parties.⁸ Such suits are permitted only in a limited class of cases. One of these is declared by section 1559 of the Civil Code, by force of which a third party is allowed to bring suit upon a contract made expressly for his benefit.⁹ Another class is where a surety may bring suit to compel his principal to fulfill the obligation for which the surety has bound himself.¹⁰

Where the contract of a deceased person is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so and enforce the contract. *El converso*, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets.¹¹ It is a presumption of law that the parties to a contract bind not only themselves but their personal representatives. Executors, therefore, are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all such contracts broken after his death; and such parties

7. *Gillin v. Hopkins*, 28 Cal. App. 579, 153 Pac. 724, per Ellison, J., *pro tem*. And see *supra*, § 200, as to construction of agreement to pay sum of money in specific articles.

8. Code Civ. Proc., § 367; *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88, 31 L. R. A. 862, 42 Pac. 900; *Biddell v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Western Dev. Co. v. Emery*, 61 Cal. 611. See PARTIES.

9. *More v. Churchill*, 155 Cal. 368, 101 Pac. 9; *Savings Bank v.*

Thornton, 119 Cal. 255, 44 Pac. 466. See *infra*, §§ 279-281, as to contracts for benefit of third persons, generally.

10. Civ. Code, § 2946; Code Civ. Proc., § 1050; *More v. Churchill*, 155 Cal. 368, 101 Pac. 9. See SURETYSHIP.

11. *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158; *Janin v. Browne*, 59 Cal. 37. See EXECUTORS AND ADMINISTRATORS.

may likewise sue on a contract, although they are not named therein.¹²

The inhibitions of section 2468 of the Civil Code run to the maintenance of an action by a person doing business under a fictitious name, or by a partnership upon or on account of "any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name."¹³ Consequently, where a contract was not made in the fictitious or partnership name, but was made in the individual names of the parties, it is clear that the section does not prohibit the parties maintaining an action for its enforcement.¹⁴ Nor is the existence of a partnership between a plaintiff and another person ground of nonsuit if it appears that the copartnership was not interested in the contract sued upon.¹⁵ It has been stated to be the rule that "if the contract contains distinct grants or promises of distinct sums to distinct payees, they would then have several interests, and certainly may, perhaps must, bring separate actions."¹⁶

§ 279. Contract for Benefit of Third Person.—Long recognized and clearly established is the principle that, where one person for a valuable consideration engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.¹⁷ Sec-

12. *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158 (quoting from *Chitty on Contracts*). See, also, section 1582 of the Code of Civil Procedure, providing that "all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." See **EXECUTORS AND ADMINISTRATORS**.

13. *Rothwell v. Vaughn*, 33 Cal. App. Dec. 260, 193 Pac. 611.

14. *Rothwell v. Vaughn*, 33 Cal.

App. Dec. 260, 193 Pac. 611; *Spreckels v. Grace Darling Hosp. Assn.*, 28 Cal. App. 646, 153 Pac. 718.

15. *Webb v. Treecony*, 76 Cal. 621, 18 Pac. 796. See **PARTNERSHIP**.

16. *Craig v. Fry*, 68 Cal. 363, 9 Pac. 550 (quoting from *Parsons on Contracts*).

17. *Washer v. Independent Mining etc. Co.*, 142 Cal. 702, 76 Pac. 654; *Whitney v. American Ins. Co.*, 127 Cal. 464, 59 Pac. 897, sustaining *Id.*, 6 Cal. Unrep. 220, 56 Pac. 50 (holding agreement of insurance

tion 1559 of the Civil Code is but an expression of this rule.¹⁸ The terms of this section are:

“A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.”¹⁹

company to pay losses of another as quickly as its own renders such company directly liable to insured of other); *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, 7 Pac. 705 (promise to answer for debt of another); *Morgan v. Overman Silver Min. Co.*, 37 Cal. 534 (agreement to pay debt of another); *McLaren v. Hutchinson*, 22 Cal. 187, 83 Am. Dec. 59; *Sierra Paper Co. v. Mesmer*, 31 Cal. App. Dec. 303, 188 Pac. 605 (agreement to pay debt of another); *Sherwood & Sherwood v. Gill & Lutz*, 30 Cal. App. 707, 173 Pac. 171 (agreement to pay debt of another); *Holder Lumber Co. v. Scarborough*, 28 Cal. App. 152, 151 Pac. 674 (loan for building purposes, lender to retain money and pay out on orders of borrower for materials used). Holding to the contrary, see *McLaren v. Hutchinson*, 18 Cal. 80. This case, however, is overruled by the following: *Chung Kee v. Davidson*, 102 Cal. 188, 36 Pac. 519; *Malone v. Crescent City etc. Transp. Co.*, 77 Cal. 38, 18 Pac. 858; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, 7 Pac. 705; *Lewis v. Covillaud*, 21 Cal. 178.

18. *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543.

19. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (holding agreement of purchaser of manufactured article with original purchasing jobber to abide by limitation on minimum selling price set by manu-

facturer was for latter's benefit); *Goff v. Ladd*, 161 Cal. 257, 118 Pac. 792 (holding creditor entitled to benefit of counter-bond taken by surety from principal); *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 76 Pac. 654; *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900 (but holding provision had no application); *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196 (agreement by assignee to pay fees of assignor's attorney); *Wickersham v. Denman*, 68 Cal. 383, 9 Pac. 723 (agreement by purchaser of interest in certain property which was the subject of a partition suit to "take it subject to all legal costs chargeable against it"); *More v. Hutchinson*, 34 Cal. App. Dec. 916; *Chase v. Dehlke*, 30 Cal. App. Dec. 79, 80, 185 Pac. 425 (agreement by assignee of lessee to pay rent); *Ferguson v. Marsh*, 37 Cal. App. 482, 174 Pac. 678 (holding provision of hauling contract that contractor would pay for oil and gasoline used by haulers not a contract for the benefit of the seller of the oil); *Sherwood & Sherwood v. Gill & Lutz*, 36 Cal. App. 707, 173 Pac. 171 (agreement to pay debt of another); *Montgomery v. Dorn*, 25 Cal. App. 666, 145 Pac. 148 (agreement to pay claims of third parties); *Konda v. Fay*, 22 Cal. 722, 136 Pac. 614; *Lundeen v. Nowlin*, 20 Cal. App. 415, 129 Pac. 474 (agreement between parties to exchange of real estate to pay brokers commissions); *J. F. Hall-Martin Co. v. Hughes*, 18 Cal. App. 513, 123 Pac. 617

This rule is based partly upon considerations of convenience and partly upon a liberal construction of the nature of such a contract, the purpose of which was to avoid circuity of action, and to enable the real party in interest to sue.²⁰ It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded.¹ While such a contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to the third party.²

Even though the third party for whose benefit a contract is made be not cognizant of it when made, the promise, if adopted by him, is deemed to have been made to him, and he may sue thereon directly, though the whole consideration moved to the promisor from the original promisee; and it is no objection to such action that the original promisee might also sue upon the promise.³

(agreement to pay debt of another); *Stanton v. Carnahan*, 15 Cal. App. 527, 115 Pac. 339 (agreement to pay broker's commission on sale of realty); *Russell v. Banks*, 11 Cal. App. 450, 105 Pac. 261 (holding contract for exclusive benefit of parties); *Northup v. Altadena etc. Syndicate*, 6 Cal. App. 101, 91 Pac. 422 (agreement, on transfer of business, to assume liabilities); *Castor v. Bernstein*, 2 Cal. App. 703, 84 Pac. 244 (release); *Peters v. George*, 1 Cal. App. 239, 81 Pac. 1117 (sale of inherited property by widow part of proceeds to go to creditor of estate of deceased husband).

20. *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88, 31 L. R. A.

862, 42 Pac. 900 (citing *Pomeroy's Remedies and Remedial Rights*).

1. *Sherwood & Sherwood v. Gill & Lutz*, 36 Cal. App. 707, 173 Pac. 171, per Conrey, J.

2. *J. F. Hall-Martin Co. v. Hughes*, 18 Cal. App. 513, 123 Pac. 617.

3. *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411; *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 Pac. 858; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, 7 Pac. 705; *Flint v. Cadenasso*, 64 Cal. 83, 28 Pac. 62; *Morgan v. Overman Silver Min. Co.*, 37 Cal. 534; *Lopizich v. Salter*, 31 Cal. App. Dec. 161, 187 Pac. 1075 (holding lessor could re-

Moreover, such a contract cannot be rescinded or revoked so long as the promisor continues to receive the consideration from the original promisee.⁴ Of course, the party for whose benefit the provision is made, and who has the right to exact its performance, may waive the same.⁵ It is incumbent upon one who would recover upon a contract made for his benefit to allege⁶ and to show affirmatively⁷ that the contract was so made.

Application of section 1559.—Section 1559 of the Civil Code has no application where a trust has been created in favor of a third person. Such trust is governed by the provisions of the code with reference to trusts.⁸ And it has been held that the terms of a contract of employment of an attorney to draft a will are distinct from the terms of the will; and the fact that the will may be intended for the benefit of a third person does not make the contract of employment of the attorney a contract made expressly for his benefit.⁹ But section 1559 is not confined in its application to the case of a sole or primary beneficiary.¹⁰ An agreement made to organize a corporation to acquire a water supply, shares of stock to be issued only to land owners entitled to the water, and to be attached to the land and transferable only with the land, is for the benefit of the corporation, the other stockholders, and also a grantee of a portion of the land. The latter,

cover on contract between lessee and his assignee); *Montgomery v. Dorn*, 25 Cal. App. 566, 145 Pac. 148.

4. *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 Pac. 858.

5. *Fairbanks, Morse & Co. v. Nelson*, 217 Fed. 218, 133 C. C. A. 212.

6. *Erickson v. Rhee*, 181 Cal. 562, 185 Pac. 847.

7. *Thompson v. Bettens*, 94 Cal. 82, 29 Pac. 336.

8. *National Bank v. Exchange Nat.*

Bank, 61 Cal. Dec. 771, 199 Pac. 1. See TRUSTS.

9. *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88, 31 L. R. A. 962, 42 Pac. 900.

10. *Goff v. Ladd*, 161 Cal. 257, 118 Pac. 792 (holding creditor entitled to benefit of counter-bond taken by surety from principal); *Washer v. Independent Mining Dev. Co.*, 142 Cal. 702, 76 Pac. 654; *Montgomery v. Dorn*, 25 Cal. App. 666, 145 Pac. 148.

being the owner of the equitable title of the stock, may enforce the contract made for his benefit.¹¹

§ 280. Intent to Benefit Third Person.—The rule of the decisions is clear to the point that in order to sustain an action for the enforcement of a contract made for the benefit of a third person, there must have been an intent clearly manifested on the part of the contracting parties to make the obligation inure to the benefit of the third party.¹² When two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other.¹³ It has been expressly stated that section 1559 of the Civil Code is not intended to apply to instances where a third person is or may be merely incidentally or remotely benefited.¹⁴ As the code declares, the contract must be one "made expressly for the benefit of a third person. . . ."¹⁵ A right in the third party to enforce a contract which may be of incidental benefit to him has, it is said, never been admitted. Some of the decisions, indeed, have gone so far as to declare that such third party must be the one solely and exclusively benefited by the contract.¹⁶ Furthermore, a third person can enforce a contract made for his benefit only to the extent to which it was intended he should be benefited thereby.¹⁷

11. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54. See *WATERS*.

12. *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543.

13. *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543.

14. *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88, 31 L. R. A. 862, 42 Pac. 900.

15. *Chung Kee v. Davidson*, 73

Cal. 522, 15 Pac. 100; *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543; *Hamilton v. Bates et al.*, 4 Cal. Unrep. 371, 35 Pac. 304.

16. *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543 (citing *Page on Contracts*). Such, however, is not the rule in California under section 1559 of Civil Code. See cases cited *supra*, § 279.

17. *Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1006.

Under section 1559 of the Civil Code, it is not necessary that the parties for whose benefit the contract was made be named in the instrument.¹⁸ But it must appear by direct terms that the contract was made for the benefit of some particular party; and this will not be implied from the fact that, if the parties perform the contract strictly, it may operate incidentally to the benefit of the third person.¹⁹

✓ **§ 281. Enforcement of Contract for Benefit of Third Person by Promisee.**—One who takes a contract in his own name for the benefit of another is a trustee of an express trust and may sue in his own name. The Code of Civil Procedure, section 369, provides:

“An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.”²⁰

✓ In code pleading, the trustee of an express trust stands as one of the few exceptions to the rule that a civil action must be brought in the name of the real party in interest.¹

18. *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Sherwood & Sherwood v. Gill & Lutz*, 36 Cal. App. 707, 173 Pac. 171; *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71 (promise by owner to convey to any purchaser who might be secured).

19. *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; second appeal, 102 Cal. 188, 36 Pac. 519; *Ferguson v. Marsh*, 37 Cal. App. 482, 174 Pac. 678; *Hamilton v. Bates*, 4 Cal. Unrep. 371, 35 Pac. 304. See as to incidental benefit, *supra*, this section.

20. *Harris v. Clayton*, 62 Cal. Dec. 73, 199 Pac. 776; *Tandy v. Waesch*, 154 Cal. 108, 97 Pac. 69; *Los Robles Water Co. v. Stoneman*, 146 Cal. 203, 79 Pac. 880; *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723; *Allen v. Chatfield*, 34 Cal. App. 785, 168 Pac. 1149; *Graham v. Franke*, 4 Cal. Unrep. 899, 38 Pac. 455. See *Anglo-Cal. Bank v. Cerr*, 147 Cal. 384, 81 Pac. 1077 (declaring section merely permissive). See, also, *TRUSTS*.

1. *Allen v. Chatfield*, 34 Cal. App. 785, 168 Pac. 1149 (quoting 30 Cya. 85). See *PARTIES*.

This exception, it has been declared, is intended manifestly to embrace not only formal trusts declared by deed, *inter partes*, but all cases in which a person, acting in behalf of a third party, enters into a written express contract with another, either in his individual name without description, or in his own name expressly in trust for or on behalf of or for the benefit of another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name, a contract is made for the benefit of another.² The real beneficiary might in due time and in his own name proceed to secure its benefits, but the rights of the trustee in this respect remain unaffected.³

§ 282. Parties Defendant.—The general rule is that only those who are parties to, or in some manner bound by, a contract are liable for a breach of it.⁴ To this general rule there are certain exceptions, as, for example, contracts for personal services involving the relation of master and servant where a third party induces a breach.⁵ But an action will not lie against one who, from malicious motives, but without threats, violence, falsehood, deception or benefit to himself, induces another to violate his contract with a third person, with whom he does not stand in the relation of master and servant, or any other personal relation. An act which does not amount to a legal injury cannot be actionable because it is done with a bad or malicious motive. Malicious motives, as is pointed out in

2. *Allen v. Chatfield*, 34 Cal. App. 785, 168 Pac. 1149 (quoting from *Considerant v. Brisbane*, 22 N. Y. 389).

3. *Horseshoe Pier etc. v. Sibley*, 157 Cal. 442, 108 Pac. 308; *Allen v. Chatfield*, 34 Cal. App. 783, 168 Pac. 1149.

4. *Galusha v. Fraser*, 178 Cal. 653,

174 Pac. 311; *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708; *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492; *Fine v. Steffan*, 79 Cal. 230, 21 Pac. 734. See PARTIES.

5. See LABOR; MASTER AND SERVANT.

another article, make a bad act worse, but cannot make that a wrong which in its own essence is lawful.⁶

The rule is settled that a plaintiff may, at his election, sue one or more or all the persons severally liable upon the same obligation or instrument.⁷ And when the liability of parties is joint and several, one or more of them may be sued, and those sued can bring in no other defendants.⁸ But where the liability is joint, all upon whom it rests must be united as defendants. This rule is general and applies to undertakings, obligations and promises of all descriptions.⁹

§ 283. Misjoinder or Nonjoinder of Parties.—In an action for a breach of contract, where no other person has acquired an interest in the matter in dispute, only parties to the contract sued on should be made parties to the action.¹⁰ One not a party to the contract sued upon, and having no interest in the relief sought, is not a proper party to the action.¹¹ Thus, where trustees are appointed under a contract to control and operate certain properties for the use and benefit of the respective parties to the agreement, such trustees are simply the agents or instruments of the parties, and have no interest in the controversy in any legal sense, and are not required to be joined as defendants in an action for breach of the contract.¹²

6. *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492. See ACTIONS, vol. 1, p. 336.

7. Code Civ. Proc., § 383; *Slater v. McAvoy*, 123 Cal. 437, 56 Pac. 49; *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 28 Pac. 795; *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. 833; *People v. Love*, 25 Cal. 521; *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220.

8. *Merchants' Trust Co. v. Bentel*, 10 Cal. App. 75, 101 Pac. 31.

9. Code Civ. Proc., § 382; *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088; *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220.

10. *Barber v. Cazalis*, 30 Cal. 92. See PARTIES.

11. *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 28 Pac. 795.

12. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 29 L. R. A. 899, 41 Pac. 495.

Where a complete determination of the controversy cannot be had without bringing in parties to the contract or transaction involved in the litigation, who have not been named as parties to the action in the original complaint, they may be brought in as parties defendant to a cross-complaint.¹³ But if a contract is made with two persons jointly, and one of them sues on it as a several contract with him, the defendant cannot take advantage of the nonjoinder of the other party to the contract, unless he pleads it.¹⁴

§ 284. Statement of the Contract in Pleading.—It is the better method of pleading a contract upon which an action is brought to state the nature of the same—that is, whether the action is on an express contract or upon a quantum valebat or quantum meruit,—yet, it has been said, the strict observance of this rule should not be held to be necessary to the statement of a cause of action impregnable against objection by special demurrer.¹⁵ However, an implied promise is a mere conclusion of law and the facts from which the promise is implied must, under our system of pleading, be stated. The rule is different in the case of an express promise, for such a promise is an ultimate fact and must be pleaded as such. Nor is the word “express” necessary to be used in pleading a promise, for when a promise is alleged, it will be held to be express.¹⁶

A written contract which is the foundation of a cause of action or defense may be pleaded in *haec verba*, rather than according to its legal effect, either by setting

13. *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36; *City of Eureka v. Gates*, 120 Cal. 54, 52 Pac. 125; *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; *Colton Land etc. Co. v. Raynor*, 57 Cal. 588.

14. *Russ v. Tuttle*, 158 Cal. 226, 110 Pac. 813; *Williams v. Southern*

Pac. R.R. Co., 110 Cal. 457, 42 Pac. 974; *Trenor v. Central Pac. R. R. Co.*, 50 Cal. 222. See PARTIES; PLEADING.

15. *Preston v. Central Cal. etc. Irr. Co.*, 11 Cal. App. 190, 104 Pac. 462.

16. *Poly v. Williams*, 101 Cal. 648, 36 Pac. 102.

forth a copy in the body of the pleading or by attaching a copy as an exhibit and incorporating it by reference.¹⁷ The latter practice seems to be recognized by express provisions of the code.¹⁸ But to enable the pleader to adopt this mode, the instrument which is thus made a part of the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege under the other mode.¹⁹ And if the instrument is not free from defect or ambiguity in those particulars, some definite construction must be put upon it by averment, or the pleading will be subject to demurrer.²⁰ Moreover, recitals in a contract incorporated in a pleading will not supply the want of essential averments.¹ Matters of substance which are preliminary or collateral to the instrument pleaded cannot be supplied by the recitals of the instrument.² On a complaint setting out the contract in *haec verba* and performance by the plaintiff's assignor, except as excused by the defendant, and claiming the contract price throughout and pay-

17. *Silvers v. Grossman*, 183 Cal. 696, 192 Pac. 534; *Santa Rosa Bank v. Paxton*, 149 Cal. 195, 86 Pac. 193 (citing authorities); *White v. Soto*, 82 Cal. 654, 23 Pac. 210; *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871; *Murdock v. Brooks*, 38 Cal. 596; *Joseph v. Holt*, 37 Cal. 250; *Love v. Sierra Nevada etc. Mining Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Stoddard v. Treadwell*, 26 Cal. 281; *Wills v. Kempt*, 17 Cal. 98; *Hill v. McCoy*, 1 Cal. App. 159, 81 Pac. 1015.

18. Code Civ. Proc., §§ 447, 448; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327.

19. *Silvers v. Grossman*, 183 Cal. 696, 192 Pac. 534; *Joseph v. Holt*,

37 Cal. 250; *Hill v. McCoy*, 1 Cal. App. 159, 81 Pac. 1015.

20. *Silvers v. Grossman*, 183 Cal. 696, 192 Pac. 534 (citing *Merkeley v. Fisk*, 179 Cal. 748, 178 Pac. 915; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Durkee v. Cota*, 74 Cal. 313, 16 Pac. 5; *Hill v. McCoy*, 1 Cal. App. 159, 81 Pac. 1015).

1. *Hayt v. Bentel*, 164 Cal. 680, 130 Pac. 432, 434 (citing *Estate of Cook*, 137 Cal. 184, 69 Pac. 968; *Burkett v. Griffith*, 90 Cal. 532, 25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527; *Los Angeles v. Signoret*, 50 Cal. 298); *Grotefend v. May*, 33 Cal. App. 321, 165 Pac. 27.

2. *Silvers v. Grossman*, 183 Cal. 696, 192 Pac. 534; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Los Angeles v. Signoret*, 50 Cal. 298.

ment according to the terms of the contract, recovery cannot be asked as for a quantum meruit et valebat.³

If the contract is pleaded, not in *haec verba*, but according to its legal effect, then the defendant may, by the rule of the common law, in a proper case, crave oyer of the instrument; and if it appear that its provisions have been misstated, he may set out the terms of the contract and demur on the ground of variance. But where a plaintiff himself sets forth the contract in terms, and then proceeds to put a false construction upon such terms, the allegation, as repugnant to the terms, should be regarded as surplusage, to be struck out on motion. *Utile per inutile non vitiatur*.⁴ Where a party relies, in his complaint, upon a contract in writing, and it affirmatively appears that all the terms are not set forth in *haec verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient.⁵ Under section 430 of the Code of Civil Procedure, separate and independent contracts should not be declared on in one count.⁶

§ 285. Pleading and Proof by Plaintiff.—Having otherwise conformed to the general rules of pleading,⁷ the plaintiff, in an action for breach of contract, must allege and prove the making of the agreement, setting forth its terms according to their legal effect or in *haec verba*.⁸

3. *Schumacher v. Adler*, 1 Cal. Unrep. 371.

4. *Love v. Sierra Nevada etc. Mining Co.*, 32 Cal. 639, 91 Am. Dec. 602. And see *Snyder v. United Prop. Co. of Cal.*, 35 Cal. App. Dec. 586, 200 Pac. 366, to the effect that the plaintiff having elected to plead the legal effect of the writing, and thereby place his own interpretation on what defendant promised to do, and the defendant having specifically denied all these allegations, whatever inference is to be indulged

in to support the complaint as pleading the due execution of the written instrument must with like force be indulged in to support the denials in the answer.

5. *Sutliff v. Seidenberg, Stiefel & Co.*, 132 Cal. 63, 64 Pac. 131, 469; *Gilmore v. Lycoming Fire Ins. Co.*, 55 Cal. 123.

6. *Fairechild etc. Co. v. Southern etc. Co.*, 158 Cal. 264, 110 Pac. 961.

7. See PLEADING.

8. *Cutting Fruit Packing Co. v. Cauty*, 141 Cal. 692, 75 Pac. 564

And the rule is fundamental that the plaintiff must allege and prove either performance or a valid excuse for non-performance, in so far as performance was incumbent upon him.⁹ If it appears from the allegations of the com-

(complaint sufficient); *Bryant v. Broadwell*, 140 Cal. 490, 74 Pac. 33 (complaint sufficient); *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202 (complaint sufficient); *McNeil v. Barney*, 51 Cal. 603; *Stout v. Coffin*, 28 Cal. 65; *O'Connor v. Dingley*, 26 Cal. 11; *Snyder v. United Prop. Co. of Cal.*, 35 Cal. App. Dec. 586, 200 Pac. 366 (holding that as the complaint did not expressly plead the execution of the agreement, it was not incumbent upon the defendant to expressly deny its execution); *Culver v. Miller*, 36 Cal. App. Dec. 401 (complaint sufficient as against general demurrer); *Banducci v. Sresovich*, 35 Cal. App. Dec. 185, 199 Pac. 72 (complaint sufficient as against general demurrer); *Gillin v. Hopkins*, 28 Cal. App. 579, 153 Pac. 724 (failure of proof); *Wineburgh v. Gay*, 27 Cal. App. 603, 150 Pac. 1003 (holding complaint which showed that parties had not completed, but were still continuing negotiations, was insufficient); *Hoffman v. Osborn*, 15 Cal. App. 125, 113 Pac. 705 (complaint insufficient); *Parsons v. Silva*, 1 Cal. App. 602, 82 Pac. 685 (complaint sufficient); *Diamond Coal Co. v. Cook*, 6 Cal. Unrep. 446, 61 Pac. 578 (complaint sufficient). See *Walsh v. Standart*, 174 Cal. 807, 164 Pac. 795 (holding that a complaint which otherwise aptly alleges a cause of action for breach of contract will not be construed as showing a previous rescission of the contract by the plaintiff, merely because it contains an averment that the

plaintiff gave the defendants a notice stating that he had elected to rescind and cancel the contract).

The averment that the agreement was made is sufficient, without alleging that it was reduced to writing and signed; but if the statute requires the agreement to be in writing, the party alleging the agreement must, if the allegation be denied, prove it by the production of the writing, or other competent evidence. *Bradford Investment Corp. v. Joost*, 117 Cal. 204, 48 Pac. 1083; *Vassault v. Edwards*, 43 Cal. 458. And see PLEADING; FRAUDS, STATUTE OF.

See DAMAGES, for full discussion of allegation and proof of damages resulting from breach of contract.

9. Civ. Code, § 1439; *Smith v. Mathews Construction Co.*, 179 Cal. 797, 179 Pac. 205 (building contract); *Krotzer v. Clark*, 178 Cal. 736, 174 Pac. 657 (unwarranted finding of performance of contract for sale of realty); *Herdal v. Sheehy*, 173 Cal. 163, 159 Pac. 422 (building contract); *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834 (contract of employment); *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454 (where insolvency of plaintiff is not charged and where defense is not based on inability of plaintiff to perform contract of sale, very slight proof of readiness to perform is necessary); *Estate of Warner*, 158 Cal. 441, 111 Pac. 352 (proof of waiver of performance of agreement to support and educate child does not justify finding of performance thereof); *Los Angeles Gas etc. Co.*

plaint or from the instrument set forth that the obligation was conditional, as, for example, if it appears that a note was given as security, the complaint does not state

v. Amalgamated Oil Co., 156 Cal. 776, 106 Pac. 55 (contract to deliver oil); *Cameron v. Burnham*, 146 Cal. 580, 80 Pac. 929 (agreement between lessees of mine); *Breedlove v. Norwich etc. Ins. Society*, 124 Cal. 164, 56 Pac. 770 (insurance policy); *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 940 (building contract); *Henry v. City of Sacramento*, 116 Cal. 628, 48 Pac. 728; *Krumb v. Campbell*, 102 Cal. 870, 36 Pac. 664 (services of attorney); *Hanson v. Slaven*, 98 Cal. 377, 38 Pac. 266 (option on stock); *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280 (sale of land); *Dennis v. Strassburger*, 89 Cal. 583, 26 Pac. 1070 (sale of land); *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867 (holding evidence did not show performance of contract as set forth); *Peasley v. Hart*, 65 Cal. 522, 4 Pac. 537 (agreement by grantee under a patent for public lands to convey to occupant of part of it the land held by him); *Loup v. California etc. R. R. Co.*, 63 Cal. 97 (construction contract); *Booth v. Chapman*, 59 Cal. 149 (sale of land); *Stockton Saving & Loan Soc. v. Hildreth*, 53 Cal. 721 (agreement by third person to pay debt in consideration of release of debtor); *Griffiths v. Henderson*, 49 Cal. 566; *Rourke v. McLaughlin*, 38 Cal. 196 (sale of land); *Hill v. Grigsby*, 35 Cal. 656 (sale of real estate on installments); *Barron v. Frink*, 30 Cal. 486 (sale of personality); *O'Connor v. Dingley*, 26 Cal. 11 (building contract); *Jerome v. Stebbins*, 14 Cal. 457 (note); *California Steam Nav. Co. v.*

Wright, 6 Cal. 258, 65 Am. Dec. 511 (holding allegation of performance sufficient); *Osborne v. Elliott*, 1 Cal. 337 (sale of vessel); *Di Fiore v. Bohnett*, 36 Cal. App. Dec. 19, 201 Pac. 145 (holding complaint insufficient); *Herspring v. United Canneries Co. of Cal.*, 36 Cal. App. Dec. 300 (evidence showing nonperformance); *Banducci v. Gresovich*, 35 Cal. App. Dec. 185, 199 Pac. 72 (building contract); *Hogue-Kellogg Co. v. Petit*, 32 Cal. App. Dec. 834, 192 Pac. 113 (sale of crop); *Rosen v. Dawson*, 33 Cal. App. Dec. 710, 195 Pac. 63 (contract for making and installation of windows); *Hearte v. Glassell Development Co.*, 31 Cal. App. Dec. 867, 189 Pac. 738 (money to be paid and conveyance of land made in return for services); *Kinkade v. Champion Horseshoe Co.*, 32 Cal. App. 435, 163 Pac. 228 (holding allegation of performance by assignor sufficient); *Manning v. Broadmoor Improvement Co.*, 30 Cal. App. 112, 157 Pac. 524 (holding evidence showed nonperformance); *Aronson v. Frankfort etc. Ins. Co.*, 9 Cal. App. 473, 99 Pac. 537 (under pleading alleging giving of notice proof of waiver of notice is inadmissible); *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723 (under pleading alleging performance of building contract, party cannot recover by showing readiness to perform and prevention by independent contractors); *Bristol v. Hershey*, 7 Cal. App. 738, 95 Pac. 1040 (holding plaintiff not entitled to relief under allegations); *Wilfley v. New Standard Concentrator Co.*, 104 Fed. 421, 90 C. C. A. 543

a cause of action unless it also alleges the happening of the condition necessary to entitle the plaintiff to recover.¹⁰ But such a rule has no application to a case where the instrument sued on is unconditional by its terms, and the condition to which it is subject is created entirely by extrinsic facts.¹¹

A complaint for breach of a contract must also state a breach in unequivocal language, and the breach must be proved.¹² Breaches which are not alleged are not pre-

(covenant to guard rights granted to licensee under patent). But see *Lompoc Produce etc. Co. v. Browne*, 41 Cal. App. 607, 183 Pac. 166 (holding that where, in an action for a breach of contract, the plaintiff alleges and relies upon performance, and makes out a prima facie case, it may thereafter rely upon the defendant's testimony and take advantage of the waiver of performance proven by it, even though such waiver may not have been pleaded).

The plaintiff need not show that he was in a position to complete the performance of his part, after the breach by the defendant; *Ahlers v. Smiley*, 163 Cal. 200, 124 Pac. 827. And see *Hullinger v. Big Sespe Oil Co.*, 61 Cal. Dec. 70, 194 Pac. 742, where the supreme court in bank denying a hearing after judgment in the district court of appeal (33 Cal. App. Dec. 506), said: "We do not approve those portions of the opinion which declare that it is essential for a plaintiff in an action for damages on the contract, whereby the contract is affirmed, to allege or prove his willingness and ability to perform the contract according to its terms."

See *supra*, § 268, as to pleading excuses for nonperformance.

10. *Thompson v. Koeller*, 183 Cal.

476, 191 Pac. 927; *Van Buskirk v. Kuhns*, 164 Cal. 472, Ann. Cas. 1914B, 932, 44 L. R. A. (N. S.) 710, 129 Pac. 587 (promise to pay debt "when able"); *Barry v. Handlin*, 36 Cal. App. Dec. 372. But see *Parke etc. Co. v. San Francisco Bridge Co.*, 145 Cal. 534, 78 Pac. 1065, 79 Pac. 71 (holding mere failure of plaintiff to allege compliance with conditions of contract is not ground for reversal upon appeal, where there is no demurrer and the case is tried upon the theory that such compliance is in issue). See, also, *Griffiths v. Henderson*, 49 Cal. 566, to the effect that in a complaint for damages for violation of a contract containing mutual covenants, it is not necessary for the plaintiff to state the facts showing the performance of conditions precedent on his part, but he may state generally that he duly performed all the conditions on his part.

11. *Thompson v. Koeller*, 183 Cal. 476, 191 Pac. 927.

12. *Cutting Fruit Packing Co. v. Canty*, 141 Cal. 692, 75 Pac. 564 (holding complaint sufficient); *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962 (holding complaint sufficient); *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379 (injunction bond); *Grant*

sumed.¹³ The complaint is insufficient if it merely alleges a promise without averring its breach; or if it assigns a breach of something which is not alleged to have been promised.¹⁴ And the omission to allege a breach cannot be aided or cured even by verdict.¹⁵

Allegation of a breach is largely governed by the nature of the contract, but a breach must be distinctly stated. Breach should be assigned in the words of the contract, or in words coextensive with the sense and effect of it.¹⁶ But if there is not an entire failure to state the fact of breach

v. Sheerin, 84 Cal. 197, 23 Pac. 1094; *Richards v. Travelers' Ins. Co.*, 80 Cal. 505, 22 Pac. 939 (insurance policy); *Morgan v. Menzies*, 60 Cal. 341 (attachment undertaking); *Salisbury v. Shirley*, 53 Cal. 461 (lease); *Bachman v. Meyer*, 49 Cal. 220 (conditional liability); *Fisher v. Pearson*, 48 Cal. 472; *Cox v. Western Pac. R. R. Co.*, 47 Cal. 87 (holding averment of prevention of performance sufficient as against general demurrer); *Englander v. Rogers*, 41 Cal. 420 (holding complaint did not show default on part of defendant); *Moore v. Besse*, 30 Cal. 570 (complaint defective); *O'Connor v. Dingley*, 26 Cal. 11; *Frisch v. Caler*, 21 Cal. 71 (note); *Dabovich v. Emeric*, 7 Cal. 209; *Id.*, 12 Cal. 171; *Culver v. Miller*, 36 Cal. App. Dec. 401 (complaint sufficient as against general demurrer); *Palmer v. Harlow*, 35 Cal. App. Dec. 254, 199 Pac. 846 (allegation of breach of contract of employment held sufficient); *Hearte v. Glassell Dev. Co.*, 31 Cal. App. Dec. 867, 189 Pac. 733 (payment of money); *Nohl v. Del Norte County*, 31 Cal. App. Dec. 39, 187 Pac. 761 (holding allegation of breach sufficient as against general demurrer); *Banducci v. Sresovich*, 35 Cal. App.

Dec. 185, 199 Pac. 72 (complaint sufficient); *Watson v. Anderson*, 36 Cal. App. 778, 173 Pac. 394; *San Francisco Commercial Agency v. Widemann*, 19 Cal. App. 209, 124 Pac. 1056 (sale of cattle); *Pettit v. Forsyth*, 15 Cal. App. 149, 113 Pac. 892; *Burke v. Dittus*, 8 Cal. App. 175, 96 Pac. 330; *Grogan v. Chaffee*, 6 Cal. App. 566, 92 Pac. 653 (holding complaint insufficient). See *National etc. Mfg Co. v. Producers' R. Co.*, 169 Cal. 740, 147 Pac. 963 (holding that an allegation in the complaint in an action for breach of contract to deliver oil that during a part of the contract period the defendant "furnished and delivered to the plaintiff crude oil," is neither an allegation nor an admission that during such period the defendant furnished sufficient oil).

13. *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919.

14. *Du Brutz v. Jessup*, 70 Cal. 75, 11 Pac. 498.

15. *Richards v. Travelers' Ins. Co.*, 80 Cal. 505, 22 Pac. 939; *Morgan v. Menzies*, 65 Cal. 243, 3 Pac. 807; *Morgan v. Menzies*, 60 Cal. 341.

16. *People v. Central Pac. R. R. Co.*, 76 Cal. 29, 18 Pac. 90.

and the averment is simply uncertain and defective, the defect can be reached only by special demurrer particularly designating the specific point at which it is aimed.¹⁷ In an action upon contract to recover money, the breach of the contract to pay is of the essence of the cause of action, and nonpayment must be alleged.¹⁸ However, it is only in actions upon contracts for the direct payment of money which can be broken in no other way than by nonpayment that it is necessary to aver nonpayment.¹⁹ And where the statement, though defective, is in the form of a conclusion, or is of a character from which the fact of nonpayment is implied, it is sufficient when questioned by general demurrer.²⁰

§ 286. Variance.—Material variance between the allegation and the proof of a contract sued on is ground for nonsuit, unless the plaintiff obtains leave to amend his complaint, so as to make it conform to the proofs;¹ or,

17. *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094.

18. *Knox v. Buckman Contracting Co.*, 139 Cal. 598, 73 Pac. 428 (complaint defective); *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398; *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20 (complaint defective); *Richards v. Lake View Land Co.*, 115 Cal. 642, 47 Pac. 683 (holding allegation that a specified amount is "now due and owing" is insufficient); *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891 (allegation "there is now due" held insufficient); *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678 (complaint defective); *Notman v. Green*, 90 Cal. 172, 27 Pac. 157 (complaint defective); *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094; *Richards v. Travelers' Ins. Co.*, 80 Cal. 505, 22 Pac. 939 (complaint defective); *Seroufe v. Clay*, 71 Cal. 123, 11 Pac. 882 (allegation

that defendant refused to pay insufficient); *Roberts v. Treadwell*, 50 Cal. 520 (allegation "that the whole thereof is now due" insufficient); *Davanay v. Eggenhoff*, 43 Cal. 395; *Frisch v. Caler*, 21 Cal. 71; *Poetker v. Lowry*, 25 Cal. App. 616, 144 Pac. 981. See PAYMENT.

19. *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466.

20. *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772; *Poetker v. Lowry*, 25 Cal. App. 616, 144 Pac. 981; *Stewart v. Burbridge*, 10 Cal. App. 623, 102 Pac. 962.

1. *Roche v. Baldwin*, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903 (implied contract alleged and special contract proved); *Owen v. Meade*, 104 Cal. 179, 37 Pac. 923 (holding contract proved was not one alleged); *Reed v. Norton*, 99 Cal. 617, 34 Pac. 333; *Cox v. McLaughlin*, 63 Cal. 196; *Johnson v. Moss*, 45 Cal. 515; *Tom-*

unless the defect is cured by the defendant's pleadings,² or, he having failed to object, by subsequent proof by the plaintiff.³ A complaint showing a contract made by plaintiffs in their individual capacities is not supported by proof of a partnership contract.⁴ Nor will proof of a special contract which is still open and unexecuted in part and has not been rescinded by mutual consent, sustain allegations of a complaint in *assumpsit*.⁵ However, the variance between allegations and proof is not fatal where the complaint alleges a written contract, while the evidence shows an oral agreement, the plaintiff being driven to parol evidence by the ruling of the court excluding the contract as alleged.⁶ And the fact that the plaintiff alleged his contract according to its legal effect, and when called as a witness stated the terms much more in detail, but not differently, does not show a variance.⁷ Any variance between the terms of the contract, as alleged in the complaint and as contained in the copy attached thereto, is only an ambiguity or uncertainty, which is removed by the finding of the court that the copy as set forth is the contract into which the parties entered.⁸ And where a contract is set forth in full in a complaint, allega-

linson v. Monroe, 41 Cal. 94; Stout v. Coffin, 28 Cal. 65 (decided under the Practice Act). See PLEADING.

2. Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 309, 73 Pac. 966.

3. Waugenheim v. Graham, 39 Cal. 169. And see Bowers California Dredging Co. v. San Francisco Bridge Co., 132 Cal. 342, 64 Pac. 475 (holding that where no objection was made by the defendant on the ground that it contained other matters not relevant to the allegations, and no request was made to have the effect of the evidence limited, the entire agreement of the parties was properly admitted in evidence).

4. McCord v. Seale, 56 Cal. 262.

5. Barrere v. Soms, 113 Cal. 97, 45 Pac. 177, 572; Ward v. Stimson, 33 Cal. App. Dec. 775, 195 Pac. 67.

6. Otten v. Spreckels, 24 Cal. App. 251, 141 Pac. 224.

7. Mills v. Geo. A. Moore & Co., 39 Cal. App. 94, 178 Pac. 304. See, also, Gibson v. McReynolds, 175 Cal. 263, 165 Pac. 921 (holding that fact that plaintiff claimed to be entitled to greater benefits under the agreement than the court found did not produce a variance between the allegations and proof so as to require a reversal of the judgment).

8. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

tions of fact in direct conflict with the contract itself are properly stricken out as conclusions of law and as being redundant and contradictory to the contract.⁹ It has been held that a mistake in a complaint as to the date when plaintiff and defendant entered into the contract gave rise to an immaterial variance, and no substantial right of defendant was affected thereby.¹⁰ In section 471 of the Code of Civil Procedure, it is enacted:

"Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, . . . but a failure of proof."¹¹

§ 287. Defenses.—One who is sued for breach of contract must, as a general rule, allege and prove either a substantial performance or a legal and valid excuse for nonperformance in order to sustain a defense,¹² unless he can show that the contract sued upon was not executed by him.¹³ If performance was prevented by the acts of plaintiff, this fact will constitute a sufficient defense.¹⁴ Settlement and payment in full also constitute a valid defense to an action for an alleged breach of the contract.¹⁵ But where the defendants undertook, not only to make

9. *Gero v. Richey*, 38 Cal. App. 21, 175 Pac. 91.

10. *Acton Rock Co. v. Lone Pine Utilities Co.*, 30 Cal. App. Dec. 739, 186 Pac. 809.

11. *Gillin v. Hopkins*, 28 Cal. App. 579, 153 Pac. 724 (holding that the differences between the contract as alleged in the complaint and the proofs adduced by plaintiffs were so pronounced as to bring the case within the rule announced in the above section of the code).

12. See *supra*, §§ 248-258, as to sufficiency of performance; §§ 259-268, as to excuses for nonperformance.

13. See *Ord v. Steamer Uncle Sam*, 13 Cal. 369 (holding that a specific allegation of a contract, in a verified complaint, is not sufficiently controverted by an answer stating that defendant has no knowledge or information respecting the same, and therefore denies the same).

14. Civ. Code, § 1511; *Puritas Laundry Co. v. Green*, 15 Cal. App. 654, 115 Pac. 660. See *supra*, § 261.

15. *Peterson v. Hubbard*, 2 Cal. Unrep. 607, 9 Pac. 106. See *COMPROMISE AND SETTLEMENT*, vol. 5, p. 399 et seq.

a plant according to certain specifications, but also guaranteed that it would do certain work, that was a warranty of the scheme as well as an undertaking to do good work in furnishing a plant, and it is no defense to an action for damages for defective materials that an efficient plant could not be constructed under the specifications, especially where the evidence shows that the work was not done in accordance with the contract, and was thoroughly defective.¹⁶

Prior to the abolition of the distinctions between sealed and unsealed instruments it was the general rule that, in case of a specialty, a subsequent parol or even written agreement, not under seal, dispensing with or varying the mode of performance of an act covenanted to be done, could not be pleaded in bar to an action on the deed for nonperformance of the act in the manner prescribed. In an early case it was declared, however, that "this doctrine must be taken with some limitation, and although there are many conflicting opinions upon this subject, we are satisfied that, upon the weight of authority as well as argument, an executed parol agreement will be a good defense against an action upon a specialty."¹⁷ Such would seem to be the rule under section 1698 of the Civil Code, providing that "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise."¹⁸

Illegality.—No presumption can be indulged that a contract which has no semblance of illegality in its terms is violative of any law. Especially must a party who would upon this ground repudiate a contract into which he has entered, and which has been fully executed by the other party, make his right to such defense manifest, not only by alleging the facts constituting illegality, but also, if the terms do not disclose illegality, by negating the

16. *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.

17. *Beach v. Covillard*, 4 Cal. 315.

18. See *supra*, §§ 225-228, as to modification of contracts generally.

existence of any facts or circumstances under which the contract could be held valid.¹⁹ If there should be an attempt to enforce any part of contracts which can be shown to be against public policy or in restraint of trade, then the court will declare such part void. Defendants will not, however, be allowed, in the action for claim and delivery, which involves only the validity of the contracts so far as performed and is not an action to enforce the contracts nor to compel the performance of them, to raise questions as to whether they are in restraint of trade or against public policy.²⁰

Fraud.—Fraud may be set up as a defense to defeat an action brought to enforce an apparent contractual obligation.¹ In such a case, the defendant may set up such matters as would justify a decree of rescission.² No rescission, however, is necessary where fraud is pleaded as a defense.³

§ 288. Breach as Defense.—As a general rule, one who himself breaches a contract, without excuse, cannot recover in an action upon it for a subsequent breach by the other party.⁴ Being the first to refuse to perform, he cannot

19. *Bernard v. Sloan*, 2 Cal. App. 737, 84 Pac. 232.

20. *California Fruit Assn. v. Stelling*, 141 Cal. 713, 75 Pac. 320. See *supra*, § 105 et seq., as to enforceability of illegal contracts.

1. *Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 Pac. 761; *Ogle v. Hubbel*, 1 Cal. App. 357, 82 Pac. 217 (holding defendant could set up fraud and undue influence as defense, though not showing he has ground for affirmative relief); *Dunlap v. Plummer*, 1 Cal. App. 426, 82 Pac. 445 (holding person of impaired mind who had right to rescind contract could also set up impairment as defense to action on contract). See FRAUD AND DECEIT.

2. *Field v. Austin*, 131 Cal. 379, 63 Pac. 692; *Dunlap v. Plummer*, 1 Cal. App. 426, 82 Pac. 445. As to grounds of rescission, see *supra*, §§ 234–236.

3. *Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 Pac. 761; *Field v. Austin*, 131 Cal. 379, 63 Pac. 692.

4. *Los Angeles Gas & Elec. Corp. v. Amalgamated Oil Co.*, 168 Cal. 140, 142 Pac. 46; *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671; *Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55; *Karales v. Los Angeles Creamery Co.*, 36 Cal. App. 171, 171 Pac. 821; *San Francisco Commercial Agency v.*

complain because the defendant refused to perform further on his part.⁵ But it is not every breach by the plaintiff which will constitute a defense. At law it is only where the obligation broken by the plaintiff was a condition precedent that the breach is a defense. And no obligation of plaintiff's contract can be regarded as a condition precedent when not made so by express terms, or by necessary implication, and where the obligation broken by plaintiff is not expressed in the contract, and probably not thought of by the parties, and is merely added to it by legal construction, it cannot have been regarded by the parties as a condition precedent to the defendant's obligation. In equity, whether the condition was precedent or otherwise, the breach of it is not a defense, where it is partial, and either immaterial or capable of being fully compensated.⁶ When a breach of contract is relied upon as a defense, the defendant must make proper averments of the same in his answer.⁷ And when setting up a breach as a defense the defendant must show affirmatively that it was not caused by his own default.⁸

§ 289. Cross-complaint and Counterclaim.—The Code of Civil Procedure provides:

“Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the con-

Widemann, 19 Cal. App. 209, 124 Pac. 1056; Bristol v. Hershey, 7 Cal. App. 738, 95 Pac. 1040; Wood, Curtis & Co. v. Seurich, 5 Cal. App. 252, 90 Pac. 51. See supra, § 237.

5. Dunn v. Daly, 78 Cal. 640, 21 Pac. 377; Twomey v. People's Ice Co., 66 Cal. 233, 5 Pac. 158; Johnson v. Moss, 45 Cal. 515; Wood, Curtis & Co. v. Seurich, 5 Cal. App. 252, 90 Pac. 51. See, also, Ross v. Tabor, 35 Cal. App. Dec. 726, 200 Pac. 971 (wherein it is declared: “The rule is that a party to a contract cannot take advantage of his own omission to observe the re-

quirements of his contract. If he breaches the contract he cannot interpose the breach as a defense to an action on the contract”).

6. Redpath v. Evening Express Co., 4 Cal. App. 361, 88 Pac. 287, per Smith, J. As to conditions generally, see supra, §§ 216-221; as to performance of conditions, see supra, § 239.

7. McGuire v. Quintana, 52 Cal. 427; Blithen v. Blake, 44 Cal. 117; Kendall v. Vallejo, 1 Cal. 371.

8. Fairbanks, Morse & Co. v. Zimmerman, 30 Cal. App. 81, 157 Pac. 509.

tract or transaction upon which the action is brought, . . . he may, in addition to his answer, file . . . a cross-complaint."⁹

Likewise, where the plaintiff's action arises out of contract, the defendant may introduce evidence of any counterclaim arising out of contract existing at the commencement of the action, even though the contracts are not the same,¹⁰ providing the contract forming the basis for the counterclaim is valid.¹¹ In this regard, the Code of Civil Procedure provides that a defendant, "in an action upon a contract," may plead, by way of counterclaim, "any other cause of action arising also upon contract and existing at the commencement of the action."¹² Mere naked trespasses, having no relation to, or connection with, the plaintiff's cause of action, nor with any contract between the parties, cannot be the foundation for a cross-complaint in an action to recover a money demand founded on contract.¹³ So, too, a counterclaim sounding in tort cannot be set up as a defense to an action arising upon contract. However, a promise or agreement to pay a stated sum of money in full satisfaction of dam-

9. Code Civ. Proc., § 442; *MacKenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36 (counterclaim for rebates). See PLEADING.

10. *Stoddard v. Treadwell*, 26 Cal. 294; *Lowry v. Law*, 27 Cal. App. 483, 150 Pac. 660 (counterclaim based upon omitted work as offset to claim for extra work). And see *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029, to the effect that the liability of one coterminal owner to the other, under section 841 of the Civil Code, for one-half the value of a division fence built by the latter, which the former uses as a part of his inclosure, is not a statutory liability, but is rather a liability upon an implied contract,

and may properly be set up as a defense by way of setoff to an action on behalf of the former, for rent due from the latter.

11. *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113 (cross-complaint for damages based on alleged contract which was void for want of recording).

12. Code Civ. Proc., §§ 437, 438; *White v. Greenwood*, 35 Cal. App. Dec. 258, 199 Pac. 1095 (holding counterclaim did not fall within classes mentioned in section 438 of the Code of Civil Procedure); *L. Scatena & Co. v. Van Loben Sels*, 19 Cal. App. 423, 126 Pac. 187. See SETOFF AND COUNTERCLAIM.

13. *Waugenheim v. Graham*, 39 Cal. 169.

ages resulting from a tort, constitutes a matter arising upon contract, and, as such, may properly be pleaded as a counterclaim to an action founded upon contract.¹⁴ The sufficiency of a cross-complaint or counterclaim must be determined wholly from its own allegations.¹⁵

Where the complaint was uncertain in the description of the contract as to whether it was written or oral, it was held that any error in overruling a demurrer for uncertainty was without prejudice, where the defendant's cross-complaint correctly described the written contract, and it was introduced in evidence, and justified the plaintiff's cause of action for breach by the defendant.¹⁶

§ 290. Amendments to Pleadings.—Amendments to pleadings in actions upon contracts are, of course controlled by the general rules of pleading.¹⁷ With reference to the complaint, it is the rule that amendments are allowable except such as have the effect of introducing a wholly different cause of action. An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes, in one sense, the cause of action. But amendments of this character, so long as the identity of the matter upon which the action is founded is preserved, are admissible; the alteration being

14. *Poly v. Williams*, 101 Cal. 648, 36 Pac. 102. See *SETOFF AND COUNTERCLAIM*.

15. *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805. See *First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 40 Pac. 45 (holding a counterclaim by the owner of a building against the contractor for the expense of keeping the structure in repair during the period of one year after completion, as required by the contract, is not sufficiently pleaded by an averment in a pleading filed after the period of

one year had elapsed, that the owner "will be required to expend more than" the sum specified for that purpose); *Vulcan Iron Works v. Cook*, 15 Cal. App. 410, 114 Pac. 995 (holding fact that delay in work was due to owner's defaults in payments was sufficient answer to his cross-complaint in action by contractor to recover unpaid installments).

16. *Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 514.

17. See *PLEADING*.

made, not to enable the plaintiff to recover for another matter than that for which he originally brought his action, but to cure an imperfect or erroneous statement of the subject matter, upon which the action was in fact founded.¹⁸ An amendment which changes a count from one upon an express contract to one upon quantum meruit does not substitute a new cause of action.¹⁹ Nor is a cause of action to recover damages for breach of a contract, as set forth in an original complaint in which the plaintiffs were described as "formerly copartners," changed by an amendment which avers that the plaintiffs continued to be copartners in the subject matter of the cause of action.²⁰ Where the plaintiff in an action upon a contract pleaded the modification thereof by agreement with the defendant and, after both parties had rested, amended the complaint by striking out the averment of modification, it was held that the defendant was entitled to avail himself of proof thereof, and to have the answer amended to conform to the proof.¹

§ 291. Evidence.—Statements have heretofore been made in this article of certain principles of evidence and their application to particular phases of contract law.² Questions relating to the admissibility of evidence, its weight, and the like, are, in actions for breach of contract, to be determined by the general rules of evidence.³ In such an action evidence is clearly admissible, in behalf of the defendant, which will prove a performance by him,⁴

18. *Doolittle v. McConnell*, 178 Cal. 697, 174 Pac. 305 (citing authorities).

19. *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Turner & Dahnken v. Bauer*, 28 Cal. App. 311, 152 Pac. 308.

20. *Ahlers v. Smiley*, 163 Cal. 200, 124 Pac. 827.

1. *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006.

2. See *supra*, § 162 et seq., as to admissibility of parol evidence in aid of the interpretation of contracts; § 56 as to evidence of mistake vitiating consent. And see *supra*, §§ 90, 91, as to the validity of contracts for the procuring or suppression of evidence.

3. See EVIDENCE.

4. *Folgar v. Buckelew*, 2 Cal. 313. See *Pacific Rys. Advertising Co. v.*

or a waiver of performance,⁵ or a breach, by the plaintiff.⁶ Evidence of performance not in compliance with the terms of the contract, however, is not admissible.⁷ Nor is evidence of the value of services rendered or material furnished, by any other standard than that adopted in the contract, admissible in an action to recover for the same.⁸

The instrument evidencing the agreement is admissible to the extent to which it sustains the allegations of the complaint. And where no objection is made by the defendant on the ground that it contains other matters not relevant to the allegations, and no request is made to have the effect of the evidence limited, the entire agreement is properly admitted.⁹ While ordinarily evidence that a certain contract was made with one person is not admissible to show that a similar contract was made with another, such evidence may, in the discretion of the court, be allowed where the circumstances indicate a strong probability that the course followed in one instance would be followed in others.¹⁰ It is the exclusive province of the jury to determine the weight of the evidence.¹¹

Error.—In an action for failure to erect a building according to contract, any error in admitting in evidence certain specifications which were not signed by the parties is cured by defendant's testimony that the work was done in accordance with the specifications, and that they were followed as closely as he could do so.¹² So, too, any

Lion Clothing Co., 37 Cal. App. 387, 174 Pac. 673 (holding evidence not sufficient to support finding of non-performance).

5. Hooke v. Great Western Lumber Co., 36 Cal. App. Dec. 506.

6. Myers v. McDonald, 68 Cal. 162, 8 Pac. 809.

7. Hinkle v. San Francisco & N. P. R. R. Co., 55 Cal. 627.

8. Fladung v. Dawson, 5 Cal. Unrep. 286, 43 Pac. 1107; Bigger-

staff v. Briggs, 2 Cal. Unrep. 339, 4 Pac. 371.

9. Bowers' California Dredging Co. v. San Francisco Bridge Co., 132 Cal. 342, 64 Pac. 475.

10. Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Miller v. Powell, 35 Cal. App. Dec. 339, 199 Pac. 857.

11. Rosenberg v. Rogers, 35 Cal. App. Dec. 152, 199 Pac. 50 (sale of crop). See EVIDENCE.

12. Watson v. Anderson, 36 Cal. App. 778, 173 Pac. 394.

errors committed in excluding testimony cannot be deemed to have been prejudicial to the defendant's rights to a fair trial, when, disregarding the incompetent matter, enough remains in the record to sustain the cause of action as alleged in the amended complaint.¹³ And it has been held that where an expert witness was prevented from answering a pertinent question, but was subsequently permitted to testify freely on the subject, the initial ruling of the court is without prejudice to the party calling the witness.¹⁴ If an action is brought on a contract the performance of which was guaranteed, and the contracting party and guarantor are joint defendants, and testimony is offered which is relevant as to the contractor, but not admissible as against the guarantor, a general objection is insufficient, but the objection must point out why the testimony ought not to be received.¹⁵ Where the evidence is conflicting upon the question of the existence of the contract, the finding of the trial court will not be disturbed on appeal.¹⁶

§ 292. Findings.—A party, in pleading a contract, is not called upon to negative the existence of every circumstance which might invalidate it, and the findings may follow the form of the pleadings.¹⁷ Hence, when the pleadings and findings declare that a contract was made, it will not be presumed that the contract is void for failure to comply with statutory requirements or for any other reason.¹⁸ In an action to recover a balance due on a contract, an allegation as to the amount due, which is admitted by the answer, is conclusive, and a finding to the

13. *Tingey v. Callahan Construction Co.*, 28 Cal. App. 777, 154 Pac. 28 (contract for excavating and grading).

14. *Herrington v. Baker*, 174 Cal. 612, 163 Pac. 1009 (sale of citrus trees). See EVIDENCE.

15. *Voorman v. Voight*, 46 Cal. 392.

16. *Del Monte Ranch Dairy v. Bernardo*, 174 Cal. 757, 164 Pac. 628.

17. As to findings generally, see TRIAL.

18. *Pacific Portland Cement Co. v. Hopkins*, 174 Cal. 251, 162 Pac. 1016. See TRIAL.

contrary must be disregarded.¹⁹ Likewise, it being established that a contract was wholly unperformed in fact, a finding that the maker has at all times been ready, able and willing to perform is wholly immaterial.²⁰ And under the rule that the plaintiff must allege and prove either performance or a valid excuse for nonperformance,¹ proof of a valid excuse for nonperformance will not support a finding of performance.² It has been held that an action to recover a sum of money under a written agreement, wherein the defendants, in their answer and cross-complaint, admit the execution of the agreement, but allege that it does not express the real intent of the parties, a finding that the defendants signed and executed and agreed to all of the provisions of the agreement is sufficient.³ If an owner pleads an offset on account of imperfections in work for which recovery is sought, and there is some evidence to show what it would cost to make them good, he is entitled to a finding on that point.⁴

§ 293. Action on Contractor's Bond.—The bond of a building contractor is so far an independent undertaking that the right to enforce it does not depend upon the subsequent or continued validity of the contract.⁵ It has been held that the provision of such a bond that any suit brought thereon must be instituted within the time allowed for instituting a suit to enforce a lien claim, does not require the owner to bring his suit on the bond on account of the contractor's default, within such time, since the owner could not know the extent of his detriment until after the expiration of the time for the commencement of

19. *Gamache v. South School District*, 133 Cal. 145, 65 Pac. 301.

20. *Sarnighausen v. Scannell*, 11 Cal. App. 652, 106 Pac. 117.

1. See *supra*, § 285.

2. *Krotzer v. Clark*, 178 Cal. 736, 174 Pac. 657; *Estate of Warner*, 158 Cal. 441, 111 Pac. 352.

3. *Berger v. Bright*, 181 Cal. 155, 183 Pac. 541.

4. *Machinery & Electrical Co. v. Young Men's Christian Assn.*, 22 Cal. App. 416, 134 Pac. 724.

5. *Kiessig v. Allspaugh*, 99 Cal. 452, 34 Pac. 106. And see *supra*, § 159.

actions by lien claimants.⁶ An owner can maintain an action upon a bond guaranteeing payment by the contractor of all claims for labor and material, where the contractor makes default, without actually satisfying such claims. In such an action, an allegation that the contractor did not pay, as required by the bond, all claims for labor and material, and that certain enumerated claims were made for materials alleged to have been furnished to be used, and actually used, in the construction of the building, is sufficient to show a breach of contract.⁷

6. *Gintjee v. Knieling*, 35 Cal. App. 563, 170 Pac. 641. For further discussion of actions on contractor's bonds, see **MECHANICS'**

LIENS; SURETYSHIP. And see generally, **BONDS**, vol. 4, p. 350.

7. *Ceremony v. Drummond*, 37 Cal. App. 446, 174 Pac. 696.

(M. C. L. and E. H. R.)

CONTRIBUTION.

- I. INTRODUCTORY.**
 - II. CONTRIBUTION BETWEEN PARTICULAR PERSONS.**
 - III. ACTIONS.**
-

I. Introductory.

- 1. Definition—Nature and Basis of Right.
- 2. Code Rules Generally—Joint Liability.
- 3. Release of One or More Joint Debtors.

II. Contribution Between Particular Persons.

- 4. Sureties Generally.
- 5. Payment by Surety.
- 6. Volunteers.
- 7. Parties to Commercial Paper.
- 8. Co-owners of Property—Trustees.
- 9. Beneficiaries of Insurance.
- 10. Judgment Debtors.
- 11. Devisees and Legatees.
- 12. Stockholders.
- 13. Tort-feasors.

III. Actions.

- 14. Remedies and Nature of Action Generally.
- 15. Remedies on Payment of Judgment by Codebtor.
- 16. Parties.
- 17. Assignment.
- 18. Averments in Complaint—Defenses.
- 19. Accrual of Action—Statute of Limitations.
- 20. Notice—Demand.
- 21. Evidence.
- 22. Execution.

Cases are cited in this article to and including 184 Cal., 43 Cal. App. and 204 Pac.

I. INTRODUCTORY.

§ 1. **Definition—Nature and Basis of Right.**—The right to contribution is one which arises in favor of an obligor who discharges more than his just share of a common burden.¹ The right does not arise from contract, but has its foundation in, and is controlled by, principles of equity and natural justice. It is based upon the equitable principle that where there is a common liability, equality of burden is equity.² Where there are different interests, the common burden should be borne in proportion to such interests;³ and where the parties receive unequal benefits from a transaction, contribution should be enforced in the same proportion.⁴ So, where the one who makes the payment received all of the benefits of the transaction, he is not entitled to contribution. And the principle cannot be invoked by one who has paid no more than in equity and good conscience he should have paid.⁵ Where,

1. *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7; *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762; *Taylor v. Reynolds*, 53 Cal. 686; *Chipman v. Morrill*, 20 Cal. 130; *Los Angeles Nat. Bank v. Vance*, 9 Cal. App. 57, 98 Pac. 58. See, *infra*, §§ 2, 4, 7 et seq., and generally, see cases cited throughout this article.

2. *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833; *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853; *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762; *Taylor v. Reynolds*, 53 Cal. 686; *Chipman v. Morrill*, 20 Cal. 130; *People v. Buster*, 11 Cal. 215; *Backer v. Grummett*, 39 Cal. App. 101, 178 Pac. 312.

While equity at first had jurisdic-

tion of cases involving the subject, yet in the course of time the common-law courts took it upon themselves to compel contribution between cosureties in the absence of a contract to that effect, on the ground of an implied contract; *Taylor v. Reynolds*, 53 Cal. 686; *Chipman v. Morrill*, 20 Cal. 130.

3. *Chipman v. Morrill*, 20 Cal. 130.

4. *Clark v. Austin*, 96 Cal. 283, 31 Pac. 293; *Chipman v. Morrill*, 20 Cal. 130.

5. *Backer v. Grummett*, 39 Cal. App. 101, 178 Pac. 312 (holding that a surety who pays a note given by himself and others to replace a note which it was his duty individually to pay cannot exact contribution from the signers on the second note).

however, no obligation, legal or equitable, exists, no right of contribution can be imposed.⁶

Where an instrument does not express the real agreement of the parties, equity, the ends of justice requiring it, will disregard the form and enforce the rights of the parties to contribution, in accordance with their actual agreement. And so, where parties to a note are to be regarded as mere sureties, as such they are entitled to the right to contribution from each other.⁷

§ 2. Code Rules Generally—Joint Liability.—The code provides that

“A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.”⁸

To apply this rule it is clear that it must first be determined that the obligation was joint, or joint and several. It does not apply where the contract is only several.⁹ The basis of the right to contribution is joint liability, and so, where this is wanting, there is no right to contribution.¹⁰ It is only where the parties are in equal right that the principle of contribution may be applied. Hence a party whose obligation is primary cannot have contribution against one whose obligation is secondary.¹¹ And a debt for which several persons are liable in dis-

6. *Tulare County v. King's County*, 117 Cal. 195, 49 Pac. 8.

7. *Hurlbut v. Quigley*, 57 Cal. Dec. 89. See, also, 180 Cal. 265, 180 Pac. 613; *Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056; *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937; *Machado v. Fernandez*, 74 Cal. 382, 16 Pac. 19; *Powell v. Powell*, 48 Cal. 236.

8. Civ. Code, § 1432. See *County of Tulare v. County of Kings*, 117 Cal. 195, 48 Pac. 8, and *Pond v.*

Dougherty, 6 Cal. App. 686, 92 Pac. 1035, construing this with other sections of the Civil Code. See *infra*, § 14, as to action for contribution as between counties.

9. *Los Angeles Nat. Bank v. Vance*, 9 Cal. App. 57, 98 Pac. 58.

10. *Los Angeles Nat. Bank v. Vance*, 9 Cal. App. 57, 98 Pac. 58; *Hewlett v. Beede*, 2 Cal. App. 561, 83 Pac. 1086.

11. *Hurlbut v. Quigley*, 57 Cal. Dec. 89.

inct proportions as principals is not a case for contribution between parties who have sustained a common loss upon a common liability. In such a case, each is, as to his own proportion, principal, and as to the proportion of each of the other makers, a cosurety.¹² Accordingly, the doctrine has no application to several and distinct subscriptions, where payment by others cannot extinguish an unpaid subscription, and where a failure to pay one subscription does not enlarge the liability of another.¹³ And no right to contribution is involved in an action by a joint maker of an unpaid joint note, to whom the note had been distributed as heir of the payee, against a comaker to enforce his liability thereon. In such an action, the distributee is entitled, by succession to the rights of the payee by operation of law, to the relief sought.¹⁴

§ 3. Release of One or More Joint Debtors.—The code provides as follows:

“A release of one of two or more joint debtors does not extinguish the obligation of any of the others, unless they are mere guarantors; nor does it affect their rights to contribution from him.”¹⁵

Prior to the adoption of this section of the Civil Code, a release of one cosurety released the others, and as to a contract of cosuretyship entered into before the section

12. *Chipman v. Morrill*, 20 Cal. 130.

13. *Los Angeles Nat. Bank v. Vance*, 9 Cal. App. 57, 98 Pac. 58 (holding that a subscription contract which provides that “We, the undersigned, agree to pay the sum set opposite our names,” etc., creates distinct and separate obligations; and that relation of cosureties is not created between the signers and no right of contribution lies thereon, by those who have paid their subscriptions against

one who has not paid). See SUBSCRIPTIONS.

14. *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075.

15. Civ. Code, § 1543; *Elizalde v. Murphy*, 146 Cal. 168, 79 Pac. 866; *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038; *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154; *Wristen v. Curtiss*, 76 Cal. 6, 18 Pac. 81; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; *Northern Ins. Co. v. Potter*, 63 Cal. 167; *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075. See GUARANTY.

was adopted, a release of one after its adoption released the others.¹⁶ The reason why a release to one debtor releases all jointly liable is that otherwise a codebtor after paying the debt might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply when the debtor released agrees to such a qualification of the release as will leave him liable to the rights of the codebtor.¹⁷

II. CONTRIBUTION BETWEEN PARTICULAR PERSONS.

§ 4. Sureties Generally.—Assuming that there is a joint liability, which, as has been pointed out, is essential to the right of contribution,¹⁸ and further assuming that one has paid more than his just proportion and that another has paid less than his share of a common burden,¹⁹ a surety may compel contribution from all cosureties jointly liable with him, and he is entitled to be subrogated not only to all the rights and securities which the creditor has against the principal debtor, but to all the rights and securities which the creditor has against cosureties.²⁰

“A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his cosureties to contribute thereto, without regard to the order of time in which they became such.”²¹

16. *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679.

17. *Northern Ins. Co. v. Potter*, 63 Cal. 157. See RELEASE.

18. See *supra*, § 2.

19. See *supra*, § 1.

20. *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762 (“In such a case, equality of benefit and of burden is equity, and the indemnity, whenever enforced,

will inure to the benefit of all the sureties”); *Pond v. Dougherty*, 6 Cal. App. 686, 92 Pac. 1035.

1. Civ. Code, § 2848; *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7; *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853; *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762; *County of Tulare v. Kings County*, 117 Cal. 195, 49 Pac. 8; *Backer v. Grummett*, 39 Cal. App. 101, 178 Pac. 312.

The liability of a cosurety to contribution is primary. Hence the right to contribution is not conditional upon inability to recover from the principal. This liability exists at common law and it has not been changed by sections 2845 to 2848 of the Civil Code so as to make liability conditional upon the insolvency of the principal.² And so, one who has paid the debt is not required to exhaust property which had been transferred to him by the principal debtor by way of indemnity, before proceeding to enforce contribution against each of the other sureties for his proportionate share of the debt; in such case the indemnity, whenever enforced, will inure to the benefit of all the sureties. Speaking of this principle it has been said:

“There is no reason why the surety who has paid the debt of his principal should assume the burden of disposing of the indemnity, and the additional burden of waiting until it is disposed of, before he can receive from his cosurety his proportion.”³

The presumption in an action for contribution is that all the sureties are solvent, but if some of them are in fact insolvent the action may be brought in equity, in which case the burden may be placed equally upon the solvent sureties.⁴ But where a surety offers to pay a note in order that he may take action against his cosureties and the principal, and the offer is refused by the payee, the surety making such tender is thereby exonerated from further

2. *Taylor v. Reynolds*, 53 Cal. 686. (“The last portion of section 2848 of the Civil Code, which provides that the surety, having satisfied the obligation of the principal, is also entitled ‘to require all his cosureties to contribute,’ etc., evidently means that the surety may compel his cosureties to contribute.”)

3. *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762 (noting the division of authority on this point in other jurisdictions). See *infra*, § 18, as to defenses.

4. *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762.

liability in case of the subsequent insolvency of the principal debtor and of the other sureties.⁵

Application of rules.—Sureties on the bond of a public official are presumed to contract together and with reference to the common responsibility, and in the event of a breach or loss, each has recourse for contribution on his fellows.⁶ Since there is no joint liability or obligation to contribute between the sureties on the separate bonds of two coexecutors whose obligations are restricted to answering to the liens for their principals' breach of duty, the rule of contribution between sureties on an original bond and those on an additional bond as prescribed by section 969 of the Political Code is held not to apply to sureties on the bonds of two or more executors. This is in accord with the rule of sureties in general, that a cosurety is entitled to stand upon the precise terms of his contract, and his liability upon a bond cannot be extended by implication beyond its express terms.⁷ But where sureties for the same principal are bound by separate bonds and the condition of the bonds is identical and the burden of the sureties is the same, they are liable to contribution inter sese.⁸

Rule as to co-contractors.—The doctrine of contribution applies equally between those who are original co-contractors, that is, between those who are jointly bound upon their own account (not being copartners) as it does between those who are cosureties jointly bound to answer for the debt or default of another.⁹

5. O'Connor v. Morse, 112 Cal. 31, 53 Am. St. Rep. 155, 44 Pac. 305.

6. People v. Buster, 11 Cal. 215.

7. Hewlett v. Beede, 2 Cal. App. 561, 83 Pac. 1086. See SURETYSHIP.

8. Dussol v. Bruguere, 50 Cal. 456 (where an administrator gives two bonds, one when letters are is-

sued and the other when real estate is about to be sold, and each bond contained the same condition); Powell v. Powell, 48 Cal. 234.

9. Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Chipman v. Morrill, 20 Cal. 130; Backer v. Grummett, 39 Cal. App. 101, 178 Pac. 312; Hewlett v. Beede, 2 Cal.

§ 5. Payment by Surety.—A surety has no claim to contribution before he has paid the principal obligation.¹⁰ And so, where the evidence shows that a surety paid a judgment with the money of another who was to receive what was recovered by way of contribution, no right to contribution is established.¹¹ Upon payment of the obligation to the principal a cosurety acquires a new obligation against his cosureties for their proportion of what he paid for them.¹² But no right of action can be thereby created against the principal, if the liability of the principal to reimburse the cosurety for advances is barred by the statute of limitations.¹³ It has been held that the payment of a note by a corporation, whose stock was owned by one of the sureties on the note and which was used by him as an instrument for the transaction of business is in fact payment by the surety.¹⁴

§ 6. Volunteers.—As a general rule, no one can be made a debtor for money paid to his use, unless it was done at his request, or unless the party paying the money was bound as surety, or otherwise, to pay it for him; and so it follows that a volunteer is not ordinarily entitled to contribution.¹⁵ "It is undoubtedly true that a payment

App. 561, 83 Pac. 1086; *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075.

10. *Taylor v. Reynolds*, 53 Cal. 686; *San Joaquin Valley Bank v. Gate City Oil Co.*, 36 Cal. App. 791, 173 Pac. 781; *Erkenbrecher v. Grant*, 31 Cal. App. Dec. 1040; *Los Angeles Nat. Bank v. Vance*, 9 Cal. App. 57, 98 Pac. 58; *Hewlett v. Beede*, 2 Cal. App. 561, 83 Pac. 1086; *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075. See *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833, holding that in an action involving contribution, a plea of payment is an affirmative defense.

11. *San Joaquin Valley Bank v. Gate City O. Co.*, 36 Cal. App. 791, 173 Pac. 781.

12. *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075.

13. *Stone v. Hammell*, 83 Cal. 547, 23 Pac. 703, 17 Am. St. Rep. 272, 8 L. R. A. 425. See *infra*, § 19, as to defense of the statute of limitations.

14. *Erkenbrecher v. Grant*, 31 Cal. App. Dec. 1040.

15. *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7; *Wolters v. Henningan*, 114 Cal. 433, 46 Pac. 277; *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19; *Curtis v. Parks*, 55 Cal. 106.

to be the foundation of a claim for contribution must be compulsory; that is, there must be a fixed and positive obligation to pay. And if one has voluntarily paid money where there was no fixed and positive obligation resting upon him to pay it, he cannot maintain an action for contribution."¹⁶ But payment of a judgment by a grantee of a mortgagor in order to prevent a sale of the property on execution is not a voluntary payment within this rule;¹⁷ and payment of the entire premium of a life insurance policy by one of several beneficiaries is not a voluntary payment where it was the only method by which the beneficiary could protect his interest in the policy. While contribution is generally compulsory, it may be optional. Thus one who has a right to share in a fund which has been preserved by another can exercise such right only upon condition that he contribute to the reimbursement of the party who alone preserved the fund.¹⁸

§ 7. Parties to Commercial Paper.—A contract of successive indorsements on a promissory note *prima facie* gives a prior indorser no right of contribution against a successive indorser.¹⁹ But successive indorsers may by a special agreement or by a joint engagement to that effect, become cosureties so as to be entitled to contribution as against each other.²⁰ And such an agreement may be

See *supra*, § 5, as to payment by a surety.

16. *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19 (per Belcher, C).

17. *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7.

18. *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833. See *infra*, § 8, as to co-owners of property, and *infra*, § 9, as to beneficiaries of insurance.

19. *Hurlbut v. Quigley*, 57 Cal. Dec. 89.

20. *Hurlbut v. Quigley*, 57 Cal.

Dec. 89; *Banker v. Osborn*, 132 Cal. 480, 64 Pac. 853; *Holm v. Burnell*, 33 Cal. App. Dec. 664, 194 Pac. 770 (where in an action brought for contribution by one obligor on a joint and several promissory note against a co-obligor it was held that the finding of a trial court upon an alleged agreement that contribution would not be claimed will not be disturbed where there is a substantial conflict in the evidence upon this question). See *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19, holding that contribu-

established by parol evidence.¹ While a volunteer is not, in general, entitled to contribution,² yet mere delay of a payee of an interest-bearing note payable on demand in presenting it does not release the parties thereto. And an accommodation indorser who pays it may maintain an action for contribution against another accommodation indorser thereon.³

§ 8. Co-owners of Property — Trustees. — Where one owner is compelled to pay the whole of a sum of money to protect his interest in property owned by himself and others and where the whole tract is liable to the payment of such sum, he is entitled to enforce contribution from his co-owners. This right does not depend upon contract,⁴ but is in the nature of an equitable lien created upon the property as security for the repayment of amounts in excess of his share.⁵ Thus, a tenant in common who has paid a debt or obligation for the benefit of the joint property, or who has discharged a lien or assessment imposed upon it as a common burden, is entitled as a matter of right to have his cotenant who has received the benefit of such payment, refund to him the proportionate share of the

tion lies between accommodation indorsers, but raising no question as to whether the indorsement of the plaintiff was prior or subsequent.

See note, 11 A. L. R., p. 1332, as to necessity of express agreement between indorsers to be jointly and not successively liable in order to give a right of contribution as between themselves.

1. See *infra*, § 21.

2. See *supra*, § 6.

3. *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19.

4. See *supra*, § 2, as to contract not basis of right to contribution generally.

5. *Ellis v. Witmer*, 148 Cal. 528, 83 Pac. 800; *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833; *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7; *Clark v. Austin*, 96 Cal. 283, 35 Pac. 293; *Hilton v. Young*, 73 Cal. 196, 14 Pac. 684 (holding that a court of equity may enforce the right to contribution from an assignee of a vendee who did not contribute to the purchase price of property, and may enforce such right by the imposition of a condition); *Chipman v. Morrill*, 20 Cal. 130; *Young v. Polack*, 3 Cal. 208; *Rich v. Smith*, 26 Cal. App. 775, 148 Pac. 545.

amount paid.⁶ And a joint tenant of an estate for years has a right of contribution for improvements made on the joint property with the consent of the joint tenant.⁷ But where co-owners enter into a contract, pursuant to the terms of which certain of them are to advance and pay all moneys required in the development or improvement of lands, and certain others are to contribute no money but to devote all their time and services to the undertaking, the latter are not liable to one of the former for contribution on the payment of a judgment for services rendered against all of them.⁸

Contribution to irrigation ditches, etc.—The code provides as follows:

“When two or more persons are associated by agreement in the use of a ditch, flume, pipe-line, or other conduit for the conveyance of water, or who are using such ditch, flume, pipe-line or other conduit, or any part thereof, for the irrigation of land or for any other lawful purpose, to the construction of which they or their grantors have contributed, he is liable to the others for the reasonable expenses of maintaining and repairing the same, and of distributing such water in proportion to the share to which he is entitled in the use of the water.”⁹

And further—

“If any one of them neglects, after demand in writing, to pay his proportion of such expenses, he is liable therefor in an action for contribution, and in any judgment obtained against him interest from the time of such demand must be included. The action authorized by this section must be brought by any or all of the parties who have contributed more than his or their just proportion of such

6. *Ellis v. Witmer*, 148 Cal. 528, 83 Pac. 800; *Rich v. Smith*, 26 Cal. App, 775, 148 Pac. 545 (applying rule to payment of mortgage to stop foreclosure proceedings).

7. *Young v. Polack*, 3 Cal. 208 (holding, however, that the court has no right to deprive a defaulting

cotenant of his interest in the lease because of his failure to pay for his share of the improvements). See COTENANCY.

8. *Kent v. Danziger*, 33 Cal. App. Dec. 684, 194 Pac. 724.

9. Civ. Code, § 842.

expenses, and may be joint or several, and therein plaintiff may recover as costs, reasonable counsel fees, to be fixed by the court."¹⁰

§ 9. Beneficiaries of Insurance.—Where the interest of one of several beneficiaries in a life insurance policy is not severable from that of others, and he pays the whole premium in order to keep the policy alive, he may require contribution to the premiums so paid from the other beneficiaries before they will be permitted to share in the proceeds of the policy. Contribution is optional in a case of this character. The court may not compel the beneficiaries to contribute in the event they do not desire to share in the proceeds of the policy, but they will be required to do so when they claim the benefits thereof. But if the interest of a beneficiary is capable of being severed and protected by paying the proportion of premium due thereon, all payments made beyond such proportion are voluntary, and hence not recoverable by way of contribution. Such a case is also contrary to the general rule in that a cause of action does not arise when the advances are made, nor at any time prior to the death of the person on whose life the policy is issued.¹¹

In marine insurance.—The rule of general average contribution is stated in the code as follows:

“A marine insurer is liable for a loss falling upon the insured, through a contribution in respect to the thing insured, required to be made by him towards a general average loss called for by a peril insured against.”¹²

10. Civ. Code, § 843. See, generally, *WATERS*.

11. *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833. See *supra*, § 6, as to voluntary payments.

12. Civ. Code, § 2744; *Firemen's*

Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618, 149 C. C. A. 614 (citing and construing section 2744, Civ. Code, with other sections of the code); *British & Foreign M. Ins. v. Maldonado & Co.*, 182 Fed. 744, 106 C. C. A. 122.

And further—

“Where a person insured by a contract of marine insurance has a demand against others for contribution, he may claim the whole loss from the insurer, subrogating him to his own right to contribution. But no such claim can be made upon the insurer after the separation of the interests liable to contribution, nor when the insured, having the right and opportunity to enforce contribution from others, has neglected, or waived the exercise of that right.”¹³

§ 10. Judgment Debtors.—It was held in an early case that where one of two defendants in a joint judgment pays it, but not with the intention of discharging it, he is entitled to use the judgment for his protection and indemnity, and may enforce it against his codefendant for his legal proportion of the debt.¹⁴ The rule at present is stated by section 709 of the Code of Civil Procedure.¹⁵

The right given under this section of the code is purely statutory,¹⁶ and is designed to furnish a judgment debtor entitled to contribution a summary method of using the judgment itself to enforce contribution in a proper case without resort to suit.¹⁷ It announces merely a rule of procedure,¹⁸ and hence it has been held that it does not pretend to deal with the matter of the right of contribution between tort-feasors.¹⁹ Moreover, as hereinafter appears, the remedy afforded by section 709 of the Code of Civil Procedure is merely cumulative—not exclusive.²⁰

Effect of payment of judgment.—The payment of a judgment by one codefendant, who does not at the time appear

13. Civ. Code, § 2745. See INSURANCE.

14. *Coffee v. Tevis*, 17 Cal. 239.

15. See JUDGMENTS.

16. *Blake v. Arp*, 32 Cal. App. Dec. 1002, 1004, 192 Pac. 452. And see cases cited *infra*.

17. *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 Pac. 379; *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24; *Blake v.*

Arp, 32 Cal. App. Dec. 1002, 192 Pac. 452; *San Joaquin Valley Bank v. Gate City Oil Co.*, 36 Cal. App. 791, 173 Pac. 781.

18. See *infra*, § 15, as to procedure under § 709, Code Civ. Proc.

19. *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 Pac. 379; *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24.

20. See *infra*, § 15.

to have taken an equitable assignment thereof, and who does not appear to have taken the steps to enforce contribution specified in section 709 of the Code of Civil Procedure, extinguishes the judgment.¹ But the fact that the payment was made by one pursuant to a judgment against him in an action which he might successfully have resisted does not deprive him of his right to contribution.²

§ 11. Devisees and Legatees.—

“When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution.”³

There is no exception in the statute on account of the nature of such devise.⁴ If a special bequest is applied to the payment of a debt, and there are other special bequests, the remedy of the one whose special bequest is thus applied is to seek contribution from the others.⁵ And where a sale of land devised is made under a deed of trust, and a surplus remains, the devise made in payment of all indebtedness due from the testator to the devisee remains, as to such surplus, subject, along with

1. *National Bank v. Los Angeles etc. Co.*, 2 Cal. App. 659, 84 Pac. 466, 468, citing Civ. Code, § 1474. And see the following cases cited to this point in *National Bank v. Los Angeles*, supra; *Reynolds v. Lincoln*, 71 Cal. 184, 9 Pac. 176, 12 Pac. 449; *Estate of Baby*, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405. See JUDGMENTS.

2. *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7. See *People v. Buster*, 11

Cal. 215 (holding that the discharge of one of the sureties on the bond of a public official affects the contract as to all, and amounts to a release of all as to all future acts of such official.

3. Code Civ. Proc., § 1564.

4. *Estate of Thayer*, 142 Cal. 453, 76 Pac. 41.

5. *In re Moulton*, 48 Cal. 191 (construing the rule under Probate Act, § 181).

other devises, to contribution for the payment of the debts and charges of administration.⁶

§ 12. **Stockholders.**—Payment of the debts of a corporation by a stockholder ordinarily gives him no right of contribution against other stockholders for the amount so paid.⁷ Thus, an action for contribution cannot be maintained against a stockholder to recover costs paid by another stockholder for procuring a release of the property of the corporation after seizure by federal officers because of nonpayment of federal taxes.⁸ But stockholders who, as sureties, sign a note executed by the corporation are not bound in their technical capacity as stockholders but as joint and several obligors, and in such case the right of contribution exists as between them.⁹ And where all the stockholders are by law made jointly and severally liable for the payment of a tax, those who have paid the tax in full have a right of contribution against the other stockholders for their proportion.¹⁰ In a case where the evidence showed that the maker, payee and indorser of a note were stockholders, and that the note was made and indorsed for the accommodation of the corporation, and was delivered to the corporation to be discounted for its use, and that the money was received and used by the corporation, it has been held that upon such facts the form of the instrument may be disregarded, and the parties to the note are to be regarded as mere sureties for the corporation, and as such entitled to contribution from each other.¹¹ It has been further held that the purchase of a promissory

6. Estate of Thayer, 142 Cal. 453, 76 Pac. 41. See EXECUTORS AND ADMINISTRATORS.

7. Wolters v. Henningsan, 114 Cal. 443, 46 Pac. 277; Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1077. See CORPORATIONS.

8. Wolters v. Henningsan, 114 Cal. 443, 46 Pac. 277.

9. Holm v. Burnell, 33 Cal. App. Dec. 664, 194 Pac. 770.

10. Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1077.

11. Kellogg v. Lopez, 145 Cal. 497, 78 Pac. 1056. See *supra*, § 1, as to form of instrument not conclusive of right.

note by a corporation whose stock is owned by one of the guarantors of the note and which is used by him as an instrumentality for the transaction of his business is in effect a payment by the guarantor of the note, and his action for contribution against his coguarantors begins to run from the date thereof.¹²

Statutory right.—An action by stockholders against other stockholders of a corporation, to enforce their liability to contribute to the payment of a note upon which the plaintiffs were sureties, and which they have paid, does not arise out of the relation of surety, but is a statutory action to enforce the liability to plaintiffs of other stockholders as principal debtors.¹³ In such an action it is not necessary to go into equity for contribution from the stockholders, because the statute gives a clear and adequate legal remedy against them, since upon payment of the note the sureties have their action in assumpsit, as sureties, directly against the stockholders as principals.¹⁴

§ 13. Tort-feasors.—California decisions are in harmony with the general rule that there is no right of contribution between joint tort-feasors.¹⁵ So where one of two joint tort-feasors pays a judgment rendered against both, and takes an assignment of the judgment, he will not be permitted to claim contribution from the other.¹⁶ It has

12. *Erkenbrecher v. Grant*, 31 Cal. App. Dec. 1040.

13. Civ. Code, § 322; *Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669, 55 Pac. 689. See CORPORATIONS.

14. *Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669, 55 Pac. 689 (citing *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62, and *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820). See *Burroughs v. Lott*, 19 Cal. 125 (holding that one of four sureties having paid the common debt—two of the sureties

being insolvent—may sue the remaining surety for his half of the debt, without joining the insolvents as parties).

15. *Adams v. White Bus Line*, 61 Cal. Dec. 119, 195 Pac. 389; *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 Pac. 379; *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24; *Lomita Land etc. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10.

16. *Adams v. White Bus Line*, 61 Cal. Dec. 119, 195 Pac. 389.

been contended that the general rule had been changed by section 709 of the Code of Civil Procedure;¹⁷ but this argument was specifically rejected on the theory that section 709 merely provided a method of enforcing contribution and was not intended to change the general rule against contribution by tort-feasors.¹⁸

III. ACTIONS.

§ 14. Remedies and Nature of Action Generally.—Equity will not assume jurisdiction of an action for contribution where a clear and adequate legal remedy is provided.¹⁹ And an action for contribution will not lie where the court has no jurisdiction of the subject matter.²⁰ The usual form of action for enforcing contribution is assumpsit for money paid to the use of the cosurety.¹ Even among the sureties themselves the action for contribution

17. See *supra*, § 10, for statement of rule under § 709, Code Civ. Proc.

18. *Adams v. White Bus Line*, 61 Cal. Dec. 119, 195 Pac. 389; *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 Pac. 379; *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24 (holding that section 709 was only an amendment to the law of procedure, and hence is subject to the general rule that an amendment to or provision in the law of procedure does not change the substantive law, unless the language used necessarily leads to that result). In *Dow v. Sunset Tel. & Tel. Co.*, *supra*, the court refused to commit itself as to whether it would make an exception to the rule in the case of a defendant, who was only passively guilty of a tort, on the ground that the facts of the case did not bring it within

the scope of the alleged exception. The court held that the facts of the case showed that both defendants actively contributed to a negligent, tortious act resulting in personal injuries and hence they were jointly liable therefor, and if one satisfies a judgment rendered against both because of such injuries, no right accrued to it of enforcing contribution from the other.

19. *Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669, 55 Pac. 689. See EQUITY.

20. *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788.

1. *Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056; *Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669, 55 Pac. 689; *Taylor v. Reynolds*, 53 Cal. 686; *Bell v. Walsh*, 7 Cal. 84. See ASSUMPSIT, vol. 3, p. 372.

is an action cognizable at law.² Since the payment of a note by a surety extinguishes the obligation of the principal thereon, it has been held that the only remedy of the surety is an action of assumpsit, based upon the implied obligation of the principal for money expended for his benefit, and that such action is barred by the lapse of two years from the payment of the money.³

It has been held in an action by a trustee for a number of contributors, including the plaintiff and the defendant, to recover the unpaid amount of a note indorsed to the plaintiff, as trustee, by the defendant, individually, that the relative rights and obligations of the defendant toward the several contributors are not involved, but should be presented in an action for the adjustment at the settlement of the trust.⁴

Nature of action.—An action for contribution is not an action on the original contract, but is one to enforce the right of contribution upon an implied contract of each to the other, that they will share the burden equally.⁵ Such an action is distinguished from one for reimbursement for money paid upon an assumpsit which the law implies where a surety is compelled to advance money for his principal.⁶ Where two or more persons are jointly liable upon an obligation and one of them makes payment of the whole, that obligation is thereby extinguished, and the one paying has a new obligation against the others for their proportion of what he paid for them.⁷ But where

2. *Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669, 55 Pac. 689; *Taylor v. Reynolds*, 53 Cal. 686.

3. *Bray v. Cohn*, 7 Cal. App. 124, 93 Pac. 893. See *infra*, § 19, as to statute of limitations.

4. *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441.

5. *Hurlbut v. Quigley*, 180 Cal. 265, 180 Pac. 613.

6. *McPherson v. Weston*, 64 Cal. 275, 30 Pac. 842. See MONEY PAID.

7. *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075. So one of two accommodation indorsers on a promissory note, upon being sued thereon, has a right to pay the same without waiting for a trial of the action, and may thereupon enforce contribution from his co-indorser; *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19.

several parties owing distinct portions of the same debt execute a joint note for the same, each is, as to his own proportion, principal, and as to the proportion of each of the other makers, a cosurety. And one of such parties who pays the debt cannot maintain an action against the others jointly for the amount thus paid, but his remedy is by a several action, against each upon the implied assumpsit of each, to reimburse what was thus paid for him.⁸

Undetermined liability.—No right to contribution exists until the claim against the joint obligors is established by an action and the judgment is satisfied. Hence in an action to foreclose a note and mortgage, the court has no authority to order a certain portion of the amount due to be set aside to answer an unpaid judgment against the defendant in another action in which it is claimed the plaintiff and defendant were proportionately liable as partners, although the plaintiff was not served with process in such case.⁹

§ 15. Remedies on Payment of Judgment by Codebtor.

Section 709 of the Code of Civil Procedure merely announces a rule of procedure.¹⁰ It permits a defendant, who has paid a joint judgment and who is entitled to contribution, to become entitled to the benefit of the judgment to enforce his right by filing with the clerk of the court within ten days from the date of the judgment, notice of such payment and claim to contribution or repayment.¹¹

8. *Chipman v. Morrill*, 20 Cal. 130.

9. *Bell v. Walsh*, 7 Cal. 84.

10. *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24; *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 Pac. 379; *Blake v. Arp*, 32 Cal. App. Dec. 1002, 1004, 192 Pac. 452; *San Joaquin Valley Bank v. Gate City O. Co.*, 36 Cal. App. 791, 173 Pac. 781. See *supra*, § 10.

11. *Adams v. White Bus Line*, 61 Cal. Dec. 119, 195 Pac. 389; *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 Pac. 379; *Finnell v. Finnell*, 159 Cal. 535, 114 Pac. 820; *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24; *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7; *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762; *Clark v. Austin*, 96 Cal. 283, 31 Pac. 293; *Davis v. Heimbach*, 75 Cal. 261,

The proceeding being statutory, the course pointed out by the statute must be strictly pursued;¹² otherwise, the court cannot grant the claim for contribution under this code provision.¹³

Remedy is cumulative.—However, the remedy under section 709 of the Code of Civil Procedure is cumulative and was not intended to displace any existing method of enforcing contribution. Hence, it has been held that a cosurety who has paid in full a judgment rendered against the principal and the other cosureties to the extent of the liability of each upon a bond, may enforce contribution from the remainder of the sureties, and may, if he chooses, proceed against them in the manner provided in section 709 of the Code of Civil Procedure; but he is not compelled to do so, and may, instead, take from the plaintiff a written assignment of the judgment upon payment thereof, and enforce it in his name by execution against each of the other sureties for his proportionate share of the debt, independent of section 709, which is not intended to include the case of such an assignment.¹⁴ The right of such assignee to the judgment in such a case is in equity rather than a legal right, and extends no further than to the use of the judgment as a security for the payment of the amounts properly due.¹⁵

17 Pac. 199; *Blake v. Arp*, 32 Cal. App. Dec. 1002, 1004, 192 Pac. 452; *San Joaquin Valley Bank v. Gate City Oil Co.*, 36 Cal. App. 791, 173 Pac. 781. See *infra*, § 20, as to notice.

12. *Davis v. Heimbach*, 75 Cal. 261, 17 Pac. 199; *Hansen v. Martin*, 63 Cal. 282.

13. *Blake v. Arp*, 32 Cal. App. Dec. 1002, 192 Pac. 452 (holding that the procedure adopted was not appropriate to enforce contribution under the provisions of section 709, where, aside from the fact that the

papers which he filed were not appropriate in their form or substance to make effectual any such claim, and it was expressly stipulated that a claim for contribution, required to be filed within ten days with the clerk of the court under the provisions of section 709, was not so filed.

14. *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762.

15. *National Bank v. Los Angeles etc. Co.*, 2 Cal. App. 659, 84 Pac. 466, 468.

§ 16. Parties.—Several sureties who have paid the whole sum for which all became liable may maintain a joint action for contribution against one who failed to pay his share, provided they jointly paid the money. And it is proper to join an executor of one of the sureties as a party plaintiff in such action. So, too, an action for contribution will lie against the representatives of a deceased surety.¹⁶ It has been held that a surety who has paid a note and received contribution from a cosurety is not a necessary party to a suit by the latter against the principal for the amount contributed.¹⁷

Under the rule of the code confining relief by cross-complaint to the parties to the action,¹⁸ it has been held that a cross-complaint by one of the guarantors defendant, who had made a payment on a note, seeking to bring all of the other guarantors in as parties, in order to enforce contribution against them, and seeking no relief against the plaintiff, is untenable, and a demurrer thereto is properly sustained, without leave to amend.¹⁹

§ 17. Assignment.—While a surety may maintain against a cosurety an action of assumpsit on the implied contract in a suit for contribution, yet it is said he cannot maintain such action as assignee of the original contract. Where the case is not a suit for contribution merely, but is upon a defendant's express promise to pay, to which the defense interposed has either wholly or partly failed, it differs from the case of contribution between sureties who are such not only upon equitable principles, but by the legal effect of their contract. In the latter case the

16. *Dussol v. Bruguere*, 50 Cal. 456. See EXECUTORS AND ADMINISTRATORS.

17. *Townsend v. Sullivan*, 3 Cal. App. 115, 84 Pac. 435. See *McPherson v. Weston*, 64 Cal. 275, 30 Pac. 842, holding in equity that an assignee for collection of one of two joint indorsers on an unpaid

note is entitled to judgment against both indorsers. As to necessary parties generally, see PARTIES.

18. Code Civ. Proc., § 442, Amdt. of 1907, Stats. 1907, p. 706. See PLEADING.

19. *Merchants' Trust Co. v. Bentel*, 10 Cal. App. 75, 101 Pac. 31.

suit for contribution can be maintained in assumpsit on the implied contract by the surety satisfying the obligation; hence it is said that it cannot be maintained by him as assignee of the original contract.²⁰ It has also been held that an assignee of a portion of a contract for the purchase of real property who is obliged to pay the purchase price of the whole tract in order to get the legal title, takes the other portion of the tract in trust for a prior assignee thereof, but he is entitled to contribution from such assignee.¹ While, in general, no claim for contribution can be enforced by a volunteer,² it is no objection to an action against the makers and indorsers of a note that the plaintiff is an assignee for collection for one of the joint indorsers who is also joined as a party defendant.³

An action by a joint maker, to whom a note had been distributed as heir upon the death of the payee, against his fellow-maker to enforce one-half of his liability upon the notes does not, it has been held, involve any claims for contribution.⁴ But where sureties on the official bond of a federal collector paid a judgment of the United States against them, they are entitled to enforce contribution against the distributees of the estate of a deceased cosurety, and to be subrogated to the rights of the United States against such distributees, including exemption from the necessity of presenting any claim against the estate.⁵ A surety cannot object to an action for contribution by the executor of a deceased cosurety upon the ground that the executor paid the demand upon which the sureties became liable without having the claim allowed by the probate court.⁶

20. Kellogg v. Lopez, 145 Cal. 497, 78 Pac. 1056.

1. Hilton v. Young, 73 Cal. 196, 14 Pac. 684.

2. See supra, § 6.

3. McPherson v. Weston, 64 Cal. 275, 30 Pac. 842.

4. Enscoe v. Fletcher, 1 Cal. App. 659, 82 Pac. 1075.

5. Pond v. Dougherty, 6 Cal. App. 686, 92 Pac. 1035.

6. Dussol v. Bruguiera, 50 Cal. 156. See EXECUTORS AND ADMINISTRATORS.

The rights and remedies of a cosurety upon the payment of more than his proportion of a judgment have been considered in a preceding section of this article.⁷

§ 18. Averments in Complaint—Defenses.—In an action for contribution by an accommodation indorser of a note against another indorser, it has been held that the complaint sufficiently alleges a joint indorsement where it sets forth the note and the contract of indorsement in full, and alleges that the note and the indorsements were executed and delivered at the same time and as one transaction. But where, in such action, there is no allegation to the effect that the agreement for contribution was joint, or that there was any agreement for contribution, express or implied, and the agreement implied by the law from the written document set up in the complaint is that the parties assumed the obligation of successive indorsers, a cause of action for contribution is not pleaded.⁸ In an action for contribution by one accommodation indorser against another, it has been held that it is not necessary to allege the accommodation character of the indorsements, and that an averment in the complaint and a finding as to the accommodation character may be disregarded as surplusage.⁹

Defenses.—When one cosurety or judgment debtor pays the debt of his principal and his right has thereupon arisen to recover from his cosurety or joint judgment debtor his proportionate share,¹⁰ upon being sued thereon, it is no defense for the defendant to set up that the plaintiff held collateral securities or properties for the purpose of indemnifying himself.¹¹ And in an action on a note given

7. See *supra*, § 15, as to cumulative character of remedy and as to optional methods of procedure in cases of claim of contribution on payment of a judgment by a cosurety.

8. *Hurlbut v. Quigley*, 57 Cal. Dec. 89.

9. *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853.

10. See *supra*, § 4.

11. *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762.

by defendant in payment of his proportionate indebtedness upon certain notes paid by plaintiffs, and of which the plaintiffs and defendant were common guarantors, the contention, as a ground of defense, that a corporation in which the plaintiffs were stockholders was the principal debtor upon the notes, and that consequently plaintiffs were primarily liable as stockholders for a certain proportion of the indebtedness represented thereby, is without merit, where the evidence shows that the corporation was not the principal debtor and not interested in the notes. And in such action, the contention that the plaintiffs failed to use ordinary diligence in compelling the stockholders to contribute, and in compelling the principals to pay the notes, at a time when the corporation and stockholders were solvent, which failure would in equity release the defendant from his liability to contribute, is without merit, where the evidence shows that the corporation was not a party to or interested in the indebtedness.¹²

The statute of limitations must be pleaded to be considered as a defense in an action for contribution;¹³ if not pleaded, it is waived.¹⁴

§ 19. Accrual of Action—Statute of Limitations.—A cause of action for contribution does not accrue at the time of execution of the contract by which persons become joint sureties, but only when one surety pays more than his share of the debt.¹⁵ Stated in other terms, the statute of limitations does not begin to run until a right to contribution arises in favor of a party who discharges more than his share of a common obligation.¹⁶ Accord-

12. *Crane v. Reynolds*, 39 Cal. App. 83, 178 Pac. 301.

13. *Hurlbut v. Quigley*, 57 Cal. Dec. 89; *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833.

14. *Hurlbut v. Quigley*, 57 Cal. Dec. 89. See LIMITATION OF ACTIONS.

15. *Hurlbut v. Quigley*, 180 Cal. 265, 180 Pac. 613.

16. *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077; *Sherwood v. Dunbar*, 6 Cal. 53 (holding that where payment is made by a settlement of accounts with the payee, the statute begins to run from the date of the appropriation of money

ingly, the right to contribution, where it is not based upon an instrument in writing, is governed by the first subdivision of section 339 of the Code of Civil Procedure, and is barred in two years.¹⁷ But a surety's right of action against a cosurety, who was absent from the state when the obligation was paid, accrues upon the return to the state of such cosurety. And if a note is given by one surety to a cosurety who has satisfied the principal debt, even if accepted as payment by the cosurety, it cannot confer a right of action against the principal, if the liability of the principal to reimburse the cosurety is barred by the statute of limitations.¹⁸

Whether a cause of action in California for contribution arising under the law of a foreign jurisdiction is barred because of the delay in bringing the action is to be determined by the statute of limitations governing the matter in such foreign state.¹⁹

Statute as governing obligation taken up by way of assignment.—It has been held that a co-obligor entitled to contribution, who takes up the obligation, at least if he takes it up by way of assignment and not by way of satisfaction, may maintain an action against his co-obligor

due by the payee to the plaintiff to the payment of the obligation); *Erkenbrecher v. Grant*, 39 Cal. App. Dec. 1040.

But where the premiums due on a policy of life insurance are paid by one of the beneficiaries therein, no right of action accrues to such beneficiary for contribution out of the proceeds of the policy until after the death of the insured person, and hence the statute of limitations does not begin to run against him prior to that time; *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833.

17. *Hurlbut v. Quigley*, 57 Cal.

Dec. 89; *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853; *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077; *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272, 8 L. R. A. 425, 23 Pac. 703; *Chipman v. Morrill*, 20 Cal. 130; *Sherwood v. Dunbar*, 6 Cal. 53; *Stone v. Hammell*, 3 Cal. Unrep. 128, 22 Pac. 203; *Crystal v. Hutton*, 1 Cal. App. 251. See LIMITATION OF ACTIONS.

18. *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272, 8 L. R. A. 425, 23 Pac. 703.

19. *Hurlbut v. Quigley*, 57 Cal. Dec. 89. See CONFLICT OF LAWS, vol. 5, p. 433.

See "Erratum,"
1926 Supp. 4717

either within two years after he takes it up, which is the period governing the obligation to make contribution which grows out of the payment as a payment and consequent discharge of the obligation, or within four years from the maturity of the notes, the period which governs an action upon the obligation to which he is subrogated. But while the co-obligor who takes up the obligation may maintain his action within either the two year or four year period in such a case, he cannot add them together. And so, where a corporation whose entire stock is owned by the guarantor of certain promissory notes and whose affairs are directed by him takes an assignment of notes from the payees for the purpose of keeping them alive, such transaction is not to be considered as a payment of the notes requiring an action for contribution to be brought within two years thereafter, but may be brought within four years from the maturity of the notes.²⁰

§ 20. Notice—Demand.—Since the liability of a co-surety for contribution is primary, and is not conditioned upon the inability of the surety to recover from the principal, a surety, upon payment of the principal obligation, is not required to notify his cosurety of such payment or to make a demand upon him for contribution, before bringing an action against him.¹ The party who claims

20. *Erkenbrecher v. Grant*, 61 Cal. Dec. 378. In this case the court said in the prevailing opinion: "The rule applied in *Coffee v. Tevis*, 17 Cal. 239, referred to in his dissenting opinion by Justice Shaw and forming the point of his opinion, does not, it seems very clear to us, affect the result in the present case. That rule is that where one of two co-obligors between whom the right of contribution exists takes up the obligation, but instead of taking it up by way of satisfaction and discharge takes

it up by way of assignment, either to himself or to someone for him for the purpose of keeping the obligation alive as against his co-obligor, the obligation will not be considered as discharged, but as remaining alive for the purpose of enforcement against the co-obligor to the extent of his proportion."

1. *Taylor v. Reynolds*, 53 Cal. 686; *Holm v. Burnell*, 33 Cal. App. Dec. 664, 194 Pac. 770. As to necessity for demand generally, see *ACTIONS*, vol. 1, p. 340.

the benefit of section 709 of the Code of Civil Procedure must file with the clerk, within ten days after his payment of more than his proportion of the judgment, notice of his payment and claim to contribution.² However, he is not required to serve the notice filed with the clerk upon the parties from whom the contribution is sought within such period of ten days.³

§ 21. Evidence.—In actions for contribution parol evidence may be admitted to show the true relations of the parties to a written obligation. Pursuant to this rule it may be shown that apparent principals are in fact sureties, or that apparent sureties are in reality principals.⁴ Hence, in an action by one of the joint makers of a promissory note against one of his comakers for contribution on account of payment of the note, it was held to be prejudicial error to exclude evidence tending to establish the defense that the proceeds of the note were used exclusively to discharge the plaintiff's own obligation.⁵ And while the rule is general that the doctrine of contribution does not obtain between indorsers, whether for accommodation or value, the *prima facie* contract of successive indorsements may be overcome either by proof of a joint agreement of indorsement, or an express or implied agreement for contribution. And it is not necessary that a verbal agreement that the indorsers should be equally liable should be proved; an inference of such an agreement may be otherwise established. The understanding in that regard may be proved like any other fact—by the circumstances surrounding them.⁶ A judgment rendered in a prior

2. *Clark v. Austin*, 96 Cal. 283, 31 Pac. 293; *Blake v. Arp*, 32 Cal. App. Dec. 1002, 1004, 192 Pac. 452.

3. *Clark v. Austin*, 96 Cal. 283, 31 Pac. 293 (overruling dicta to the contrary in *Davis v. Heimbach*, 75 Cal. 262).

4. *Hurlbut v. Quigley*, 57 Cal. Dec. 89; *Kellogg v. Lopez*, 145 Cal.

497, 78 Pac. 1056; *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7; *Backer v. Grummett*, 39 Cal. App. 101, 178 Pac. 312. See SURETYSHIP.

5. *Backer v. Grummett*, 39 Cal. App. 101, 178 Pac. 312.

6. *Hurlbut v. Quigley*, 57 Cal. Dec. 89. See EVIDENCE.

action against the plaintiffs for the amount of the common liability may be admitted in evidence for the purpose of showing that the plaintiffs were compelled to pay such obligation.⁷ And a judgment will not be disturbed because of the admission of irrelevant evidence where it is clear that it was not injurious or prejudicial to the appellant.⁸

§ 22. **Execution.**—A notice of motion by a surety who has paid more than his share of a judgment, for execution against his cosureties, must be served upon such cosureties.⁹ Although, as has been pointed out, it is not necessary that the notice filed with the clerk as required by section 709 of the Code of Civil Procedure be served on the cosureties.¹⁰ And it is immaterial whether, upon such motion for execution, the surety seeks to invoke the provisions of section 709 of the Code of Civil Procedure,¹¹ or whether he is acting under an assignment of the judgment.¹² It is also a rule that where one of two defendants pays a joint judgment, he will not be allowed to enforce it against a codefendant for a greater sum than is legally chargeable against him as his proportion of the debt.¹³

7. *Wolters v. Henningsan*, 114 Cal. 433, 46 Pac. 277.

8. *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833. See *APPEAL AND ERROR*, vol. 2, p. 1004.

9. *Clark v. Austin*, 96 Cal. 283, 31 Pac. 293; *Davis v. Heimbach*, 75 Cal. 262, 17 Pac. 199; *National Bank v. Los Angeles etc. Co.*, 2 Cal. App. 659, 84 Pac. 466, 468 (holding that such notice is juris-

dictional to the power of the court to grant the order).

10. See *supra*, § 20.

11. *Clark v. Austin*, 96 Cal. 283, 31 Pac. 293.

12. *National Bank v. Los Angeles etc. Co.*, 2 Cal. App. 659, 84 Pac. 466, 468.

13. *Williams v. Biehl*, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762; *Coffee v. Tevis*, 17 Cal. 239.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION AND RECONVERSION.

- I. IN GENERAL.**
- II. CONVERSIONS UNDER WILL.**
- III. RECONVERSION.**

I. In General.

- 1. Definition—Scope of Article.
- 2. Contract for Sale of Land.
- 3. Requisites as to Trustee's Power to Sell.
- 4. Rules Applied.

II. Conversions Under Will.

- 5. Realty Converted into Personalty.
- 6. Intention—Doctrine of Conversion not Favored.
- 7. Power to Sell Under Will.
- 8. Persons Benefited by Direction to Convert.
- 9. Contract to Sell Property Disposed of by Will.
- 10. Where Land is Situated in a Foreign State.

III. Reconversion.

- 11. In General.
- 12. Unanimity of Beneficiaries Required.
- 13. Acts Which Effect a Reconversion.

I. IN GENERAL.

§ 1. Definition—Scope of Article.—Conversion in equity has been defined as “the transformation of one species of property into another, as money into land or land into money; or, more particularly, a fiction of law, by which,

Cases are cited in this article to and including 184 Cal., 43 Cal. App. and 203 Pac.

equity assumes that such a transformation has taken place (contrary to the fact) when it is rendered necessary by the equities of the case,—as to carry into effect the directions of a will or settlement,—and by which the property so dealt with becomes invested with the properties and attributes of that into which it is supposed to have been converted.¹ The rule is an outgrowth or application of the old maxim that equity regards that as done which ought to be done,²—a principle very frequently invoked in determining the validity and the proper execution of trusts,³ rights as to lands purchased with partnership assets,⁴ rights as between vendor and vendee under an executed contract for the sale of lands,⁵ and the rights of devisees and beneficiaries under wills directing the conversion of real property into money.⁶

This article is limited to the treatment of conversion and reconversion in equity, and hence matters relating to the action for the conversion of personal property and damages for the wrongful taking and detention of such property are treated elsewhere in this work.⁷ While the principles pertaining to the conversion of partnership assets into lands and the dealing with such lands as partnership assets are offshoots of the doctrine of equitable conversion, they are so intimately connected with partnership agreements and partnership law as an integral branch of equity jurisprudence that they are reserved for specific treatment

1. Black's Law Dict., 267.

2. In re Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Janes v. Throckmorton*, 57 Cal. 368; Civ. Code, § 3529.

3. See *infra*, § 3. And see TRUSTS.

4. See *Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133, 16 L. R. A. 745, 30 Pac. 605, where it is said that lands acquired by a partnership for partnership uses constitute partnership assets, and will be treated in equity as personalty,

whether the partnership was formed by oral or written agreement; and the same principle applies when the object of the partnership is to deal in lands which are purchased with partnership assets. See *infra*, this section, under scope of article as to conversion on partnership assets.

5. See *infra*, § 2, and see VENDOR AND PURCHASER.

6. See *infra*, §§ 5-10.

7. See CLAIM AND DELIVERY, vol. 5, p. 153; TROVER AND CONVERSION.

in another article.⁸ The remedy in equity for the specific enforcement of contractual rights to real property notwithstanding a change in the character thereof to personal property is also treated elsewhere.⁹

§ 2. Contract for Sale of Land.—Upon the execution of a contract for the sale of real property, an equitable conversion is worked.¹⁰ In such case, the purchaser of the land is deemed the equitable owner thereof, whereas the seller is considered the owner of the purchase price,¹¹ with an equitable lien upon the land for the purchase money and holding the legal title as security for the enforcement of his lien.¹² The equitable conversion thus deemed to exist from the time a valid contract of sale is entered into may or may not be absolute; and whether it is, or not, will depend upon whether the terms of the contract of sale are subsequently complied with. If there is no default in that respect, but, on the contrary, the purchaser performs all the conditions precedent which under the contract entitle him to a conveyance on a given day, he will be deemed on that day to be the owner of the land and the seller to be the owner of the purchase money. The fact that the contracting owner refuses to perform his part of the agreement and make conveyance cannot affect the status or rights of the parties as to the property. The purchaser having performed or offered to perform his covenants at the date when the contract called for a conveyance to him, equity considers the property as belonging to him as of that date, and the owner as simply holding the legal title in trust for him.¹³

8. See PARTNERSHIP.

9. See SPECIFIC PERFORMANCE.

10. Estate of Dwyer, 159 Cal. 664, 115 Pac. 235; Carr v. Howell, 154 Cal. 372, 97 Pac. 885 (being the first appeal in the action arising on the contract construed in Estate of Dwyer, supra).

11. Estate of Dwyer, 159 Cal. 664, 115 Pac. 235.

12. See VENDOR AND PURCHASER.

13. Estate of Dwyer, 159 Cal. 664, 115 Pac. 235. See *infra*, § 9, as to contract to sell property disposed of by will. See SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

§ 3. Requisites as to Trustee's Power to Sell.—To constitute a conversion of real estate into personalty, in the absence of an actual sale, it must be made the duty of, and obligatory upon, the trustee to sell it in any event. The direction to sell must be positive, irrespective of all contingencies and independent of discretion.¹⁴ It is not sufficient to effect an equitable conversion that, so far from the power being obligatory upon the trustee to sell, it is contemplated that a portion of the land might be saved from sale.¹⁵ It is not essential, however, that the direction should be express, in order to be imperative; it may be necessarily implied.¹⁶ And where a power to convert is given without words of command, so that there is an appearance of discretion, if the trusts or limitations are of a description exclusively applicable to one species of property, this circumstance is sufficient to outweigh the appearance of an option, and to render the whole imperative.¹⁷

§ 4. Rules Applied—*Land taken for public use.*—It is a rule of equity, based upon the doctrine of equitable conversion, that when land is taken for public use, the money awarded for such land remains, and is to be considered, as

14. Estate of Pforr, 144 Cal. 121, 77 Pac. 825; Bank of Ukiah v. Rice, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020; Estate of Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; Janes v. Throckmorton, 57 Cal. 368; Estate of Spreckels, 5 Cal. Prob. Dec. 311.

If the act of converting is left to the option, discretion or choice of the trustee, then no equitable conversion will take place, because no duty to make the change rests upon him; Estate of Skae, 1 Cal. Prob. Dec. 405. See *infra*, § 7, for application of this rule to wills.

15. Janes v. Throckmorton, 57 Cal. 368.

16. Estate of Skae, 1 Cal. Prob. Dec. 405.

17. Estate of Skae, 1 Cal. Prob. Dec. 405. See Estate of Spreckels, 5 Cal. Prob. Dec. 311, citing Fahnestock v. Fahnestock, 152 Pa. 56, 34 Am. St. Rep. 623, 25 Atl. 313, to the rule that where it plainly appears that effect cannot be given to material provisions of the instrument creating the trust without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the instrument as if it contained a positive direction to sell.

land in respect to all rights and interests relating thereto. The money, in such cases, is deemed to represent the land, and is applied in equity to discharge the liens upon it, precisely in accordance with the legal or equitable rights of creditors or encumbrancers in respect to such land. And so, where mortgaged property was partially destroyed by reason of the tortious acts of the city wherein it was located, the mortgagee, in an action of foreclosure, is entitled to have included in the decree, a provision that, in the event the proceeds of the sale are insufficient to satisfy the mortgage indebtedness, the amount of such deficiency be paid out of a judgment obtained against the city in an action for damages for the tort. Nor is the right of the mortgagee to have the deficiency paid out of the judgment changed, under such circumstances, by the fact that the money was awarded to the grantee of the mortgagor, since in equity the money must be treated as the land itself.¹⁸

Proceeds of insurance on buildings.—The proceeds of a policy of insurance effected by trustees for a loss happening to buildings on the land during the continuance of the trust estate, and not expended for the purposes of the trust, will, on the determination of the trust estate, be regarded, in equity, as real property, and will belong to the owner of the reversion. In such case the money stands in the stead of the building, and, in equity, is vested in the owner of the reversion, upon the termination of the trust, in the same manner as would the building had the trustees expended the money in the erection of a building.¹⁹

Doctrine not applicable to invalid trust.—The doctrine of equitable conversion cannot be invoked to aid an invalid trust in real estate for a term of years upon the theory that the real estate is to be treated as sold and converted into personal property, when the direction is for a future

18. Los Angeles Trust & Sav. Bank v. Bortenstein, 32 Cal. App. Dec. 195, 190 Pac. 850. 19. Hawes v. Lathrop, 38 Cal. App. 493.

sale at the expiration of the term; but up to the time fixed for the sale, the land must be governed by the law of real estate. And so where it was urged as to such a trust that under the equitable doctrine of conversion the land should be treated as sold and converted into personalty, and that such a trust in personal property would be valid, and that, therefore, the trust must be upheld, it has been said by the court that "this would not only be a surprising application of the doctrine, but would be a novel and startling method of evading the law against perpetuities by invoking an equitable fiction."²⁰

II. CONVERSIONS UNDER WILL.

§ 5. Realty Converted into Personalty.—The doctrine of equitable conversion is fully recognized in California by section 1338 of the Civil Code, which provides that

"When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death."¹

This provision is simply declaratory of the common law, and has not changed the rule that such direction does not vest title in the executor, or cut off the heir at law, in the absence of any devise of the land.² Under the rule above stated, where the testator devised a life estate in certain

20. In re Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772 (per Henshaw, J.). See PERPETUITIES.

1. Estate of Phelps, 182 Cal. 752, 190 Pac. 17; Estate of Loyd, 175 Cal. 699, 167 Pac. 157; Estate of Pforr, 144 Cal. 121, 77 Pac. 825; Bank of Ukiah v. Rice, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020; In re Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; Fatjo v. Swasey, 111 Cal. 628, 44

Pac. 225; Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091. See Estate of Hills, 176 Cal. 232, 168 Pac. 20, holding that a subsequent conversion into personalty did not change the title which vested at death.

2. Estate of Loyd, 175 Cal. 699, 167 Pac. 157 (stating that Civ. Code, § 1338, is merely declaratory of the equitable doctrine); Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091.

real property to his widow, and, without making any devise of the remainder, directed its sale by the executor after the widow's death, and distribution of the proceeds to some of his children, the children named were vested with the entire interest therein, and the result of such direction was to convert the land into personalty, to take effect when the executor had power to make the sale; and in such case the beneficiaries may therefore be deemed legatees rather than devisees.³ It has been held that the question as to whether there was a conversion of realty into personal property is not necessarily involved where the title to the real estate was confirmed in the beneficiary under the will by the decree of distribution.⁴ And in a case where the deed and covenant do not work an equitable conversion of the land into personal property, it has been held that the sale of such interest by the administrator as personal property is void.⁵

Time of conversion.—The provision in section 1338 of the Civil Code that the proceeds of the sale must be deemed personal property "from the time of the testator's death" is applicable only when the will merely directs the sale to be made without limiting or designating the time at which it is to be made. If the will postpones the time of the sale until the happening of some future event or until some fixed date, the conversion is likewise postponed.⁶ It has been held that a devise to trustees with directions to sell for the purpose of converting the estate

3. *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

The superior court is not authorized in the exercise of its probate jurisdiction to direct a conversion of the testator's property into securities to be invested so as to allow only the income thereof to a life tenant, nor to require the life tenant to give any security before

receiving the legacy; *In re Garrity*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

4. *French v. Phelps*, 20 Cal. App. 101, 128 Pac. 772.

5. *Janes v. Throckmorton*, 57 Cal. 368.

6. *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

into money to be applied in carrying out further trusts created in the proceeds and with power to sell immediately, does not occasion an unlawful suspension of the power of alienation, and this is equally true where a future date is fixed for the exercise of the power if the donees are permitted to sell in the meantime in their discretion.⁷

§ 6. Intention—Doctrine of Conversion not Favored.—

Whether a conversion is effected depends upon the intention of the testator as gathered from the entire provisions of his will. If it is apparent that it was his will that the estate be sold and the proceeds given to his beneficiaries, an equitable conversion results, even if the direction for the sale is not imperative.⁸ The question of conversion is a question of intention, and the real question is: Did the testator intend that his land should be converted into money at all events before distribution?⁹ If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property be changed, then a conversion necessarily takes place.¹⁰

Doctrine of conversion not favored.—The inclination of courts of equity is not to change the quality of property, unless there is some clear intention or act by which a definite character, either as money or as land, has been unequivocally fixed upon it throughout; and if this intention does not clearly appear, the property retains its original character.¹¹ In this connection it has been said that conversion should be admitted for the accomplishment of equitable results only, and in its application watchfulness is

7. Estate of Phelps, 182 Cal. 752, 190 Pac. 17.

8. Estate of Pforr, 144 Cal. 121, 77 Pac. 825.

9. Estate of Pforr, 144 Cal. 121, 77 Pac. 825; Estate of Spreckels, 5 Cal. Prob. Dec. 311.

10. Estate of Pforr, 144 Cal. 121, 77 Pac. 825. See WILLS.

11. *Janes v. Throckmorton*, 57 Cal. 382; Estate of Spreckels, 5 Cal. Prob. Dec. 311.

required to guard against a tendency to make of it a formal rule de jure regardless of its real purpose and necessity. Moreover, it should never be overlooked that there is no real conversion, for the property remains all the time in fact, realty or personalty, just as it was; but for the purpose of the will or other instrument, so far as it may be necessary, and only so far, it is treated in contemplation of law as if it had been converted.¹²

§ 7. Power to Sell Under Will.—In order to work a conversion while the property is yet actually unchanged in form, there must be a clear and imperative direction in the will to convert the property—that is, to sell land for money, or lay out money in the purchase of land.¹³ In considering the doctrine of conversion in relation to the power to sell conferred upon an executor the authorities distinguish between a case where, on the one hand, the power to sell is mandatory and is coupled with and wholly subsidiary to the trusts to be carried out under the will,¹⁴ and, on the other hand, where the exercise of the power under the will is discretionary with the executor, as where he is authorized to sell, convey or lease any portion of the estate, for such prices and upon such terms as he may think best. And so, while the rule is that the statutes confer upon an administrator with the will annexed all powers given to the executor for the purpose of paying debts or legacies, or both, and especially when there is an equitable conversion of land into money for the purposes of such payment or distribution, or where the power of sale is imperative and does not grow out of a personal discretion confided to an individual, such powers are not so conferred where the trust is discretionary and is conferred upon an

12. 6 Ruling Case Law, 1066. And see *supra*, § 1, as to the doctrine generally.

13. Estate of Spreckels, 5 Cal. Prob. Dec. 311; Estate of Skae,

1 Cal. Prob. Dec. 405. And see cases *supra*, § 3, as to the nature of power of sale generally.

14. Kidwell v. Brummagim, 32 Cal. 436.

executor or for a special purpose collateral to the ordinary duties of an executor or administrator, or indicating a special confidence reposed in him as an individual.¹⁵ And it is the rule in California that the fact that the entire estate of a testator, both real and personal, is distributed as one fund does not raise any presumption of an equitable conversion of land into money.¹⁶

Will directing sale of homestead.—A will whereby a testatrix authorizes the sale of all her property, and attempts to dispose thereof in the form of money bequests, her property consisting of the premises she and her husband had occupied as a homestead, though not then protected as such by selection and recording, does not operate as an actual conversion of the property into money. And so it has been held that the beneficiaries take their interests in such property subject and subordinate to the authority conferred by law upon the court to set the same apart for a limited period to the surviving husband as a homestead, as well as to appropriate the same for the payment of debts.¹⁷

§ 8. Persons Benefited by Direction to Convert.—The law has always been that the direction in wills to convert land into money or money into land is for the benefit of those for whose use the conversion is intended to be made, and that as to them it is deemed to have been made from

15. *Crouse v. Peterson*, 130 Cal. 169, 80 Am. St. Rep. 89, 62 Pac. 475, 615 (holding that a power to sell lands of the testator given by a foreign will to the executor named therein, the exercise of which is discretionary with him, does not vest in an administrator with the will annexed appointed in this state as to lands there situated, so as to validate a sale of such lands made without a prior au-

thorization of the probate court, and for a purpose not administrative). See EXECUTORS AND ADMINISTRATORS.

16. *Crouse v. Peterson*, 130 Cal. 169, 80 Am. St. Rep. 89, 62 Pac. 475, 615 (citing authorities of a foreign state to a different rule).

17. *In re Lahiff*, 86 Cal. 151, 24 Pac. 850. See EXECUTORS AND ADMINISTRATORS; HOMESTEADS.

the death of the testator.¹⁸ Hence, a direction to the executor of a will to convert all the testator's property, real, personal, or mixed, into money, operates as a conversion of the land into money from the death of the testator only for the benefit of those for whose use the conversion is intended to be made.¹⁹ But such a direction does not affect the title or character of the property so far as the legatees or heirs are concerned, or prevent the trustees from acquiring the legal estate in the land, subject to the trust.²⁰ Nor does it deprive the heir of the right to maintain an action of ejectment for the possession of the land and for recovery of the rents, issues and profits thereof as against any person other than the executor. The code does not provide that such a direction shall operate as a devise of the land directed to be converted to the executor.¹

§ 9. Contract to Sell Property Disposed of by Will.—A contract of sale cannot be deemed an equitable conversion into money, of land sold, so that the title thereto cannot pass under the will of the deceased vendor, where the cancellation of the contract was fully effected by agreement of the parties thereto during the life of the vendor. The doctrine of equitable conversion is precluded in such a case by the terms of section 1301 of the Civil Code, providing that

“An agreement made by a testator for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement for a specific performance or otherwise, against the

18. *Fatjo v. Swasey*, 111 Cal. 628, 44 Pac. 225; *Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091. See *infra*, § 13, as to effect of taking, or electing not to take, under the will, and as to the effect of the nonjoinder of a pretermitted heir to a reconversion.

19. *Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091.

20. *Fatjo v. Swasey*, 111 Cal. 628, 44 Pac. 225 (action by trustee to quiet title).

1. *Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091.

devises or legatees, as might be had against the testator's successors if the same had passed by succession."²

In construing such a contract, the use of the word "sold" therein does not conclusively show a present conveyance and does not alter the rule.³

§ 10. Where Land is Situated in a Foreign State.—

Bearing in mind that the whole question of the devolution of title of lands in a foreign state is wholly subject to the jurisdiction of the laws of that state, consideration must be paid to that law in reviewing facts touching conversion, nonconversion or reconversion.⁴ But where there is a provision for the sale of outside personal and real property, and the investment of the proceeds in real estate in California the income of which is to be applied as directed, the property mentioned in the will is to be considered as real property in California.⁵ It has been held that where a daughter inherited, under the laws of Colorado, lands in that state, owned by her intestate father at the time of his death, and she died thereafter, a resident of California, and after the daughter's death the lands were sold by the Colorado administrator of the father's estate, at probate sale, and the proceeds distributed by decree of the Colorado court to the heirs of the daughter and transmitted to the

2. Estate of Goetz, 13 Cal. App. 198, 109 Pac. 145. See *supra*, § 2, as to when contract of sale effects an equitable conversion.

3. Estate of Goetz, 13 Cal. App. 198, 109 Pac. 145, citing as to the meaning of the word "sold" in this connection the following cases: Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981; Payne v. Neuval, 155 Cal. 46, 99 Pac. 476; Shainwald, Buckbee & Co. v. Cady, 92 Cal. 83, 28 Pac. 101; Eaton v. Richeri, 83 Cal. 185, 23 Pac. 286; Blackwood v. Cutting Packing Co.,

76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248. See *VENDOR AND PURCHASER*.

4. Estate of Hills, 176 Cal. 232, 168 Pac. 20; Estate of Loyd, 175 Cal. 699, 167 Pac. 157; Estate of Skerrett, 2 Cal. Prob. Dec. 552. See *infra*, § 11 et seq., as to reconversion. And see *CONFLICT OF LAWS*, vol. 6, p. 469.

5. Estate of Dunphy, 147 Cal. 95, 81 Pac. 315 (holding that it is sufficient that the trusts in relation thereto are valid under section 857 of the Civil Code).

administratrix of her estate in California, by an ancillary administratrix in Colorado, the sale of the land did not work a conversion of the proceeds into personal property.⁶

III. RECONVERSION.

§ 11. **In General.**—It is a rule in equity that where a testator directs land to be sold and the proceeds thereof to be distributed among certain designated beneficiaries, such beneficiaries may elect before the sale has taken place to take the land instead of its proceeds,⁷ and thus effect its reconversion into real estate.⁸ If the beneficiaries before a conversion of the lands should elect to take the property on its actual, instead of its destined state, a conversion would be thereby prevented, and the character of the property changed from that impressed upon it by the testator to that which it actually possesses.⁹ And upon such reconversion of the estate into real property, the relation of the beneficiaries to the land would be the same as if it had been directly devised to them.¹⁰ Reconversion may take place at any time during the period of constructive conversion and prior to the actual conversion by sale.¹¹ But until the beneficiaries make the election for a reconversion of the estate and manifest such election to the executor, they are not entitled to the possession of the land, or to exercise any dominion over it.¹²

6. *Estate of Hills*, 176 Cal. 232, 168 Pac. 20.

7. *Estate of Loyd*, 175 Cal. 699, 167 Pac. 157; *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

8. *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825. And cases cited *infra*. See *infra*, § 13, as to acts which effect reconversion.

9. *Estate of Loyd*, 175 Cal. 699, 167 Pac. 157.

10. *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020 (holding, under the rule, that the beneficiaries could properly maintain a suit in partition).

11. *Estate of Loyd*, 175 Pac. 699, 167 Pac. 157.

12. *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

§ 12. Unanimity of Beneficiaries Required.—Unanimity of all the beneficiaries is essential to accomplish a reconversion.¹³ One beneficiary cannot effect it.¹⁴ And so, a conveyance by one beneficiary of his undivided interest in the land will not operate as a reconversion of that interest, since it needs no argument to show that the value of a tract is impaired if the land can be sold only in fractional interests. As a necessary sequence of this rule, if any of the beneficiaries are incapable of making an election,—that is, if they are infants, or lunatics, or incompetent, or otherwise disqualified from making contracts with reference to their property,—there can be no reconversion of the estate. Hence, where some of them are minors incapable of election, there can be no reconversion by any part of the beneficiaries, though they may have manifested their intention to take the land.¹⁵

The sole effect of a failure of all the parties in interest to join in the election is that no reconversion takes place and the equitable conversion still stands. But this is no bar to a subsequent reconversion by the act of all parties in interest at any time before actual conversion.¹⁶

Burden of proof.—As reconversion depends upon election by the beneficiaries, such election is an affirmative element in the establishment of their right to the land, and must be manifested by some unequivocal act or declaration. And a plaintiff whose right of action rests upon a reconversion resulting from such election must not only show this fact by his complaint, but also establish it by proof.¹⁷

13. *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825; *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

14. *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825.

15. *Bank of Ukiah v. Rice*, 143

Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

16. *Estate of Loyd*, 175 Cal. 699, 167 Pac. 157.

17. *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

§ 13. Acts Which Effect a Reconversion.—Generally speaking, a reconversion is effected when all the parties beneficially interested, by some explicit and binding action, direct that no actual conversion shall take place and elect to take the property in its original form.¹⁸ Hence, the commencement of an action for partition may be such a positive and unequivocal act as to indicate an election to take the land, and if all of the parties interested are capable of making such election, and unite in the prayer for partition, a reconversion is effected.¹⁹ So, too, a conveyance of the land by all the beneficiaries may effect a reconversion, since they thereby part with their right to the proceeds of the sale, as well as with their right to the land, and cease to have any interest in the execution of the power.²⁰ Likewise, a valid election by all the devisees to take lands as lands, and as heirs, and not to take under the terms of the will, effects a reconversion, and destroys the power given to the executor to convert the lands into money for the purpose of distribution under the will.¹ Parties interested in the subject matter of a conversion or reconversion under a will, however, include only those who are beneficiaries of the particular devise; hence it has been held that a pretermitted heir who takes outside of and in hostility to the will cannot by his nonjoinder defeat a reconversion by all the devisees under the will. And where the widow elects not to take under the will, but under the law which

18. *Estate of Loyd*, 175 Cal. 699, 167 Pac. 157. See *supra*, § 8, as to parties benefited by conversion generally.

19. *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

20. *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020 (holding that if the reconversion is to be effected by a

conveyance, such conveyance must be made by all of the beneficiaries, unless the estate is of such character that a conveyance by one or more of them will not impair the interest of the others).

1. *Estate of Loyd*, 175 Cal. 699, 167 Pac. 157; *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

entitles her to take a larger percentage of the personality than of the realty, she cannot contend that the will, notwithstanding her election to take under the law, effectuated an equitable conversion of the realty, and that one-half of the proceeds inured to her benefit. In this connection it has been well said: "The election which the widow is required to make is between rights, not between benefits. She has the right to abide by her husband's disposition of his property, or the right to override it and claim under the intestate law. These rights are inconsistent and cannot coexist. . . . The law does not permit her to say there is a will for conversion, and no will as to her share."²

2. Estate of Loyd, 175 Cal. 699, 167 from Cunningham's Estate, 137 Pa. Pac. 157 (citing many authorities St. 621, 21 Am. St. Rep. 901, 20 to the general principle and quoting Atl. 714). See WILLS.

(J. G. J.)

CONVEYANCES.

See DEEDS; FRAUDULENT CONVEYANCES.

CONVICTION.

See CRIMINAL LAW.

CONVICTS.

See PRISONS AND PRISONERS.

CO-OPERATIVE ASSOCIATIONS.

See ASSOCIATIONS, vol. 3, p. 345.

COPARCENERS.

See COTENANCY.

CORONERS.

1. Scope of Article.
2. Nature of Office—Who may Perform Duties.
3. Duties in General.
4. Discretion as to Holding Inquest—Second Inquest.
5. Duty to Act for Other Officers—Fees.
6. Witnesses.
7. Record as Evidence.

§ 1. **Scope of Article.**—This article treats of the office and duties of coroners. Matters pertaining to the election of coroners, in common with public officers generally, the qualifying of coroners and their liability, are considered elsewhere.¹ While the power of a coroner to act in another office than that of coroner is considered in this article,² his duties, while acting in such other capacity are considered in the appropriate articles.³

§ 2. **Nature of Office—Who may Perform Duties.**—A coroner is a county officer.⁴ And so it has been held that since the coroner of the city and county of San Francisco is a county officer, the general laws pertaining to the powers and duties of coroners are as applicable to him as to any other coroner in the state; and that the provisions of a special act applicable only to such coroner are repealed by the general provisions of the County

1. See PUBLIC OFFICERS. As to bond of coroner, see Pol. Code, § 4022.

2. See *infra*, § 5.

3. See EXECUTORS AND ADMINISTRATORS; SHERIFFS AND CONSTABLES.

4. Pol. Code, § 4013; *Kuhlman v. Superior Court*, 122 Cal. 636, 55 Pac. 589; *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87. See PUBLIC OFFICERS.

Cases are cited in this article to and including 184 Cal., 43 Cal. App. and 203 Pac.

Government Act on the same subject.⁵ While ordinarily the office of coroner is a distinct office, it may nevertheless be consolidated by action of the board of supervisors, after the manner of the consolidation of certain county offices generally,⁶ either with the office of public administrator, or with that of district attorney.⁷ And, under certain charter provisions, the office may be consolidated with that of the sheriff. But when the sheriff is performing the duties of coroner he is, in contemplation of law, the coroner of the county as distinctly and completely as any other duly appointed or elected person would be when lawfully performing those duties, and therefore the powers and duties pertaining to the office of coroner are not affected by a charter provision that the person appointed as sheriff shall also be the coroner.⁸ A justice of the peace may act as coroner if the office of coroner is vacant, or he is absent or unable to attend.⁹

If the coroner is absent or unable to attend, the duties of his office may be discharged by any of his deputies with like authority, and subject to the same obligations and penalties as the coroner.¹⁰

§ 3. Duties in General.—When a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death was occasioned by the criminal act of another, he must go to

5. *Kuhlman v. Superior Court*, 122 Cal. 636, 55 Pac. 589.

6. See PUBLIC OFFICERS.

7. Pol. Code, § 4017.

8. *More v. Board of Supervisors*, 31 Cal. App. 388, 160 Pac. 702. See JURY, as to summoning of jurors by an elisor appointed by the court where both the sheriff and the coroner are disqualified to act in that capacity.

9. Pol. Code, § 4147. See *infra*, § 4, as to coroner acting for other officers and in other capacities.

10. Pol. Code, § 4147a, (added May 5, 1917, Stats. 1917, p. 248). See Stats. 1895, p. 168, as to appointment of stenographer to coroner in certain counties, and Stats. 1893, p. 190, as to appointment of assistants in such counties.

the place where the body is; cause it to be exhumed if it has been interred, and proceed to summon jurors and hold an inquest in the manner prescribed by law.¹¹ He must summon and swear in a jury of not less than nine nor more than fifteen persons to appear before him, forthwith, at the place where the body of the deceased is, to inquire into the cause of his death;¹² and he may summon witnesses and compel them to testify.¹³ When a jury is secured, the jury and the coroner must view the body of the deceased, and they are not authorized to proceed with the inquest until they have made such inspection.¹⁴ In the exercise of his duty he may summon a physician or surgeon to examine the body, or have a post-mortem examination made thereon when it is necessary to determine the cause of death.¹⁵

Duties in respect to the inquisition.—A coroner must keep a complete record of each inquest held,¹⁶ and he must reduce the testimony taken thereon to writing and file it with the county clerk.¹⁷ If, however, the person charged with having caused the death of the subject of the inquest is arrested before the inquisition can be filed, the coroner must deliver the same, with the testimony taken, to the magistrate before whom such person may be brought, who must return the same, with the deposition and statement taken before him, to the office of the clerk of the superior court of the county.¹⁸ And where the jury finds that the person was killed by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by

11. Pen. Code, § 1510. See *infra*, § 4, as to discretion in holding inquest and as to second inquest. See Code Civ. Proc., § 195, for definition of jury of inquest.

12. Pen. Code, §§ 1510, 1511.

13. See *infra*, § 6.

14. Pen. Code, § 1511b.

15. Pen. Code, § 1512. See *Stats.*

1895, p. 52, as to appointment of physicians by coroners in counties of first class to perform autopsies. See *infra*, § 6, as to witnesses.

16. Pol. Code, § 4145. See *infra*, § 4, as to second inquest.

17. Pol. Code, § 1515.

18. Pen. Code, § 1516.

criminal means, and the party committing the act is ascertained by the inquisition, and is not in custody, the coroner must issue a warrant for the arrest of the person charged.¹⁹ If the jury finds that a murder or manslaughter has been committed, the coroner may bind over witnesses to appear and testify before the grand jury, or a magistrate or the superior court.²⁰

To initiate health measures.—It is the duty of a coroner to take such measures as may be necessary to stop the spread of contagious diseases, and to report at once in writing such cases to the secretary of the state board of health.¹

As to property of the deceased.—The coroner may have sufficient of the property of the deceased sold to pay the expenses of the inquest;² and he must deliver over any money or other property found upon the deceased to the legal representatives of the deceased or to the treasurer on failure of the legal representatives to demand such property within thirty days after the inquest, and also file an affidavit in the office of the treasurer showing the amount of the property of the deceased that came into his hands and his disposition of the same.³ The property found upon the dead body, if not claimed by any legal representative of the decedent within thirty days after an inquest, is to be sold by the coroner at public auction, and the proceeds of such sale must be immediately delivered to the treasurer and placed to the credit of the county.⁴

If the coroner or any justice of the peace acting as coroner fails to deliver to the treasurer within forty days after the inquest upon a dead body all the money, or proceeds from the sale of property found upon such body, unless claimed in the meantime by the public administra-

19. Pen. Code, § 1517. And see
Pen. Code, § 1518, for the form of
such warrant.

20. Pen. Code, § 1514a.

1. Pol. Code, § 2979a.

2. Pol. Code, § 4144.

3. Pol. Code, §§ 4145, 4146.

4. Pol. Code, § 4146a.

tor or other legal representative of the decedent as required by law, the district attorney must proceed against the coroner or justice of the peace acting as coroner to recover the same by civil action in the name of the county.⁵

§ 4. Discretion as to Holding Inquest—Second Inquest. The coroner is allowed to exercise a reasonable discretion in determining whether an inquest is necessary in a given case, and it will be presumed that his decision was made in good faith. If he has reasonable ground to suspect that the death or killing of a person was sudden and unusual; and of such a nature as to indicate the possibility of death by the hand of the deceased, or through the instrumentality of some other person, he has authority to hold an inquest. He may act upon information; and it should not be held that, merely because it has been subsequently determined that the deceased died a natural death, he had no right to hold an inquest.⁶ The coroner has no power, however, to hold a second inquest upon a body unless an error was made by the jury in the identity of the body, in which case he has discretion to call another inquest without reference to the court, and a memorandum of the error must be entered upon the erroneous inquisition.⁷ But he cannot hold a second inquest where the first was not quashed nor set aside by the court, or where a legal inquest had been held by another official.⁸ And there must be but one inquest held upon several bodies of persons who were killed by the same cause, and died at the same time.⁹ In holding an inquest it has been held that a coroner acts in the performance of functions judicial in their character.¹⁰

5. Pol. Code, § 4146.

6. *Morgan v. County of San Diego*, 3 Cal. App. 454, 86 Pac. 720.

7. Pen. Code, § 1511a.

8. *Morgan v. San Diego County*, 452.

3 Cal. App. 454, 86 Pac. 720. See *infra*, § 5, as to when fees cannot be collected for a second inquest.

9. Pen. Code, § 1511a.

10. *People v. Devine*, 44 Cal.

§ 5. Duty to Act for Other Officers—Fees.—When the sheriff is a party to an action or proceeding, the process and orders therein which it would otherwise be the duty of the sheriff to execute, must be executed by the coroner,¹¹ and the coroner is authorized to perform the duties of the public administrator when the latter fails to qualify or to perform the duties of his office.¹²

Fees.—The fees of coroners are fixed by law.¹³ An allowance by the supervisors for the services of a coroner is of the nature of *res adjudicata*. Hence, where such allowance was paid by the treasurer upon the auditor's warrant, it cannot be recovered back in a collateral action by the county which does not directly attack the judgment of the board but proceeds upon the alleged ground that the services were not in fact rendered by the coroner.¹⁴ If a justice of the peace has held an inquest upon a body, it must be presumed, in the absence of evidence to the contrary, that he discharged his duty in the premises; and where such inquest is not shown to have been unlawful, the coroner cannot recover compensation for an inquest subsequently held by him upon the same body.¹⁵

§ 6. Witnesses.—The coroner has power to summon witnesses to attend and testify at an inquest;¹⁶ and it is his duty to summon and examine as witnesses every person who in his opinion, or in that of the jury, has any knowledge of the facts. He may also summon a surgeon or physician to inspect the body, or hold a post-mortem examination thereon, or a chemist to make an analysis of

11. Pol. Code, §§ 4148, 4172.

12. Pol. Code, § 4183.

13. See Pol. Code, § 4230 et seq., as to salaries and fees of officers generally. See *People v. Hale*, 27 Cal. 148, for construction of act of 1864, relative to fees of the coroner of the City and County of San Francisco. See *Stats.* 1880, p. 43,

as to costs of inquest in state prison.

14. *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475.

15. *Morgan v. County of San Diego*, 3 Cal. App. 454, 86 Pac. 720.

16. Pen. Code, § 1513.

the stomach or the tissues of the body of the deceased, and give a professional opinion as to the cause of the death.¹⁷ It is the duty of the coroner to examine the witnesses,¹⁸ but the district attorney has the right to be present at an inquest when he has reason to believe a crime has been committed.¹⁹ A witness cannot be compelled to give incriminating testimony against himself, at an inquest.²⁰ If the jury finds that a murder or manslaughter has been committed, the coroner may bind over the witnesses against the accused to appear and testify before the grand jury, or a magistrate, or the superior court, and to obey all orders of such magistrate or court in the premises. In order to secure their appearance, the witnesses may be compelled to sign a recognizance in a sum fixed by the coroner and approved by a judge of the superior court, and in the event of their refusal to sign the recognizance, the coroner has power to commit such witness as in the case of examination of an accused person by a magistrate.¹ The coroner must have the testimony of the witnesses examined before the jury reduced to writing, which, together with the inquisition and all recognizances taken, must be filed in the office of the county clerk.² But the testimony of the witnesses only is required to be reduced to writing. Hence it has been held that where an accused makes certain statements at the inquest, not as a witness, but which were deposed to by persons who heard them, there is no requirement of the law that such statements be put in written form.³

Power to punish for contempt.—The code provides that "A witness served with a subpoena may be compelled to attend and testify, or be punished by the coroner for dis-

17. Pen. Code, § 1512, and Pol. Code, § 4143.

18. Pen. Code, § 1512.

19. Pen. Code, § 1520.

20. *People v. Taylor*, 59 Cal. 640.

1. Pen. Code, § 1514a.

2. Pen. Code, § 1515. And see Pol. Code, § 4143.

3. *People v. Taylor*, 59 Cal. 640.

obedience in like manner as upon a subpoena issued by a justice of the peace."⁴

§ 7. Record as Evidence.—The record of coroner's inquest or verdict of a coroner's jury is not admissible as evidence in another proceeding against one who took no part in the inquest.⁵ The verdict of the jury is a matter of mere opinion and hearsay, where it does not purport to contain a statement of any fact within the knowledge of the coroner or any juror.⁶ And even though a coroner acts in a judicial capacity, an inquest cannot bind one who was not a party thereto.⁷ Thus, a coroner's inquisition is not admissible as evidence in an action to set aside the probate of a will of the deceased;⁸ nor is it admissible to show that the death of the plaintiff's testator was due to the negligence of another.⁹ The verdict is not even prima facie evidence as tending to show the cause of the death of the deceased.¹⁰

But it has been held that where the record of a coroner's jury is admitted in evidence for a certain purpose, it becomes a part of the record of the proceedings for all purposes, and is then prima facie evidence of other facts therein contained. Thus, in an action to recover upon a policy of insurance, a coroner's inquest, finding death due to suicide, and which was admitted for the sole purpose of showing compliance with the requirements of an insurance

4. Pen. Code, § 1513; *Kuhlman v. Superior Court*, 122 Cal. 636, 55 Pac. 589; *People v. Taylor*, 59 Cal. 640. See *CONTEMPT*, vol. 5, p. 926.

5. *Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695 (stating that the great weight of authority in other jurisdictions also support this rule); *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855.

6. *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855.

7. *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

8. *Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695 (applying rule to foreign inquest).

9. *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

10. *Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695; *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

policy as to preliminary proof of death, was then regarded as prima facie evidence of the manner and cause of the death of the deceased.¹¹ While a witness cannot be compelled to give incriminating testimony against himself, nevertheless, proof of voluntary incriminating statements, made by one at a coroner's inquest, is admissible in a prosecution subsequently instituted against him for the murder of the deceased.¹² And it is said to be clear upon principle that a witness may be contradicted by the production of a deposition given by him before a coroner.¹³

11. *Walther v. Mutual L. Ins. Co.*, 65 Cal. 417, 4 Pac. 413.

13. *People v. Devine*, 44 Cal. 452.
See CRIMINAL LAW.

12. *People v. Taylor*, 59 Cal. 640.

CORPORATIONS.

- I. INTRODUCTORY. (§§ 1-27.)
- II. CREATION, ORGANIZATION AND CONSOLIDATION. (§§ 28-60.)
- III. CORPORATE EXISTENCE. (§§ 61-82.)
- IV. NAME, SEAL, RESIDENCE OR PLACE OF BUSINESS. (§§ 83-101.)
- V. PROMOTERS AND SECRET PROFITS. (§§ 102-112.)
- VI. BY-LAWS AND RECORDS. (§§ 113-134.)
- VII. CAPITAL STOCK AND ITS INCIDENTS. (§§ 135-162.)
- VIII. SUBSCRIPTIONS TO AND SALE OF CAPITAL STOCK. (§§ 163-185.)
- IX. TRANSFERS OF STOCK. (§§ 186-229.)
- X. RELATION AND RIGHTS OF STOCKHOLDERS IN GENERAL. (§§ 230-273.)
- XI. STOCKHOLDERS' MEETINGS AND ELECTIONS. (§§ 274-295.)
- XII. LIABILITY FOR FULL PAYMENT OF STOCK. (§§ 296-332.)
- XIII. ASSESSMENTS ON STOCK. (§§ 333-366.)
- XIV. LIABILITY OF STOCKHOLDERS AND MEMBERS FOR CORPORATE OBLIGATIONS. (§§ 367-414.)
- XV. OFFICERS AND AGENTS GENERALLY. (§§ 415-504.)
- XVI. LIABILITY OF OFFICERS AND AGENTS. (§§ 505-541.)
In Vol. 7.
- XVII. POWERS, FUNCTIONS AND LIABILITIES. (§§ 542-579.)
In Vol. 7.
- XVIII. BONDS AND BONDED INDEBTEDNESS. (§§ 580-608.)
In Vol. 7.
- XIX. ACTIONS BY AND AGAINST CORPORATIONS. (§§ 609-626.)
In Vol. 7.
- XX. DISSOLUTION OR FORFEITURE. (§§ 627-669.) In Vol. 7.
- XXI. RECEIVERS. (§§ 670-678.) In Vol. 7.
- XXII. FOREIGN CORPORATIONS. (§§ 679-709.) In Vol. 7.
- XXIII. TAXATION. (§§ 710-731.) In Vol. 7.

Cases are cited in this article to and including 184 Cal., 43 Cal. App. and 200 Pac.

I. Introductory.

GENERAL CONSIDERATIONS.

1. Scope of Article.
2. General Survey.
3. Definition and General Attributes.
4. Corporation as a "Person."
5. Distinguished from Other Associations.
6. Growth of Corporate Activity.
7. Power of State Over Corporations.
8. Power of the Legislature.
9. Limitation on Power of Legislature.
10. Examination or Visitation.

CORPORATE ENTITY.

11. In General.
12. Disregard of Corporate Entity in General.
13. "One-man" Corporations.
14. Status of Owner of "One-man" Corporation.
15. Corporation as Instrumentality of Partnership.
16. Reincorporation in General.
17. Reincorporation to Evade Statute.
18. Evidence of Identity.
19. Extent of Liability of New Corporation.
20. Corporation Continuing Business of Partnership or Individual.

CLASSIFICATION.

21. In General.
22. Corporations Aggregate and Sole.
23. Public, Private and Quasi-public Corporations.
24. Irrigation, Reclamation or Levee Districts.
25. Counties—School Districts—Miscellaneous.
26. Homestead Corporations.
27. Industrial Loan Companies.

II. Creation, Organization and Consolidation.

BY GENERAL OR SPECIAL ACT.

28. In General.
29. Creation Under General Laws.

30. Special Legislation.
31. Corporations not Within Prohibition.
32. Change of Name as "Creation."
33. Recognition by Act of Legislature.
34. Creation by Implication.
35. Incorporation by Grantees of a Franchise.
36. Assignment of Franchise or Special Privilege.
37. Conferring of Special Benefits.

AMENDMENT OF THE GENERAL LAWS.

38. In General.
39. Corporate Charter as Contract.
40. Power to Alter Charter.
41. Scope of Reserved Power to Alter.

COMPLIANCE WITH STATUTORY PROVISIONS.

42. In General—Conditions Precedent.
43. Substantial Compliance.

INCORPORATORS.

44. In General.
45. Liability in Case of Defective Organization.

ARTICLES AND CERTIFICATE.

46. In General.
47. Contents of Articles.
48. Subscription and Acknowledgment.
49. Articles and Certificate as Evidence.
50. Filing Articles and Issuance of Certificate
51. Filing Copies in Counties.
52. Failure to File Copies in Counties.
53. Pleading Failure to File Copies.
54. Amendment of Articles in General.
55. Execution and Filing of Amendments.
56. Organization After Incorporation.

CONSOLIDATION.

57. In General.
58. Consent of Stockholders.

- 59. Status of Compliance After Consolidation.
- 60. Transmission of Powers and Liabilities.

III. Corporate Existence.

PERIOD.

- 61. In General.
- 62. Extension of Corporate Existence.

CONTINUING EXISTENCE UNDER THE CODES.

- 63. Election to Continue Under Codes.
- 64. Corporation not Continuing Existence.

DE FACTO EXISTENCE AND ESTOPPEL.

- 65. In General.
- 66. Elements of De Facto Corporation.
- 67. Law Authorizing Existence.
- 68. Organization in Good Faith.
- 69. Powers of De Facto Corporation.
- 70. Freedom from Collateral Attack.
- 71. Right to Question Existence De Facto.
- 72. Estoppel to Deny Corporate Existence.

PLEADING.

- 73. Averment of Corporate Existence.
- 74. Taking Advantage of Corporate Incapacity.
- 75. Denial of Corporate Existence.

PROOF.

- 76. In General.
- 77. Proof by Parol.
- 78. Proof in Criminal Proceedings.
- 79. Proof by Admissions.
- 80. Admissions by Pleadings.
- 81. Foreign Corporations.
- 82. Presumptions.

IV. Name, Seal, Residence or Place of Business.

NAME.

- 83. In General.

- 84. Misnomer of Corporation.
- 85. Use of Similar Corporate Names.
- 86. Use of Trade Names.
- 87. Change of Name in General.
- 88. Judicial Nature of Proceedings.
- 89. What Corporations may Change Name.
- 90. Petition for Change of Name.
- 91. Notice of Hearing of Petition.
- 92. Hearing and Order for Change of Name.

SEAL.

- 93. In General.
- 94. Necessity for Seal.
- 95. Rule as to Effect of Seal.
- 96. Reason for the Rule.
- 97. Proof of Seal.
- 98. Authority to Affix Seal.

PLACE OF BUSINESS—RESIDENCE.

- 99. In General.
- 100. Residence.
- 101. Change of Principal Place of Business.

V. Promoters and Secret Profits.

- 102. In General.
- 103. Fiduciary Relation and Duty.
- 104. Secret Profits Generally.
- 105. Stockholders Protected.
- 106. Sales to Corporation in General.
- 107. Sales by Owners.
- 108. Liability for Fraud Generally.
- 109. Enforcement of Liability.
- 110. Limitation and Laches.
- 111. Liability of Corporation.
- 112. Ratification of Promoter's Agreement.

VI. By-laws and Records.

BY-LAWS.

- 113. Definition and Purposes.

- 114. Power to Enact in General.
- 115. Adoption of Code of By-laws.
- 116. In Whom Power Vested.
- 117. Amendment, Repeal or Revision.
- 118. Record or Evidence of By-laws.
- 119. Contents of By-laws.
- 120. Validity and Construction in General.
- 121. Validity of Particular By-laws.
- 122. Retrospective Operation.
- 123. By-law as a Contract.
- 124. Persons Bound by By-laws.
- 125. Waiver.

RECORDS.

- 126. In General.
- 127. Stock Records.
- 128. Effect of Corporate Records as Evidence.
- 129. Minutes in General.
- 130. Proof of Action not Recorded in Minutes.
- 131. Minutes and "Parol Evidence" Rule.
- 132. Minutes and the "Best Evidence" Rule.
- 133. Production and Authentication of Records.
- 134. Proof by Copy of Record.

VII. Capital Stock and Its Incidents.

IN GENERAL.

- 135. Nature of Shares.
- 136. Situs of Stock.
- 137. Certificates as Distinguished from Shares.
- 138. Right to Particular Certificate.
- 139. Specific Performance of Stock Agreement.
- 140. Possessory Actions for Stock.
- 141. Actions to Determine Ownership.

PREFERRED STOCK.

- 142. Creation of Preferences.
- 143. Limitations upon Preferences.

PAR VALUE AND MARKET VALUE.

- 144. In General.

- 145. Stock of No Par Value.
- 146. Market Value as Basis of Damages.

INCREASE OR REDUCTION OF CAPITAL STOCK.

- 147. In General.
- 148. Procedure for Increase.
- 149. Notice of Meeting.
- 150. Reduction of Capital Stock.
- 151. Certificate of Proceedings.

CORPORATE LIEN ON STOCK.

- 152. In General.
- 153. Creation of Lien as Against Bona Fide Purchaser.
- 154. Lien by Contract or Statutory Provision.

ISSUE OF CERTIFICATES.

- 155. In General.
- 156. Form and Nature of Certificate.
- 157. Issuance Prior to Full Payment.
- 158. Necessity for Issuance.
- 159. Compelling Issuance—Limitations Applicable.
- 160. Fraudulent or Unauthorized Issue.
- 161. Effect of Issuance of New Certificate.
- 162. Issuance of Duplicate Certificate.

VIII. Subscriptions and Sale of Capital Stock.

GENERAL CONSIDERATIONS.

- 163. Character of Subscription Contract.
- 164. Who may Subscribe.
- 165. Construction of Subscription Contracts.
- 166. Nature of Agreement Prior to Incorporation.
- 167. Enforcement of Subscriptions Made Prior to Incorporation.
- 168. Necessity for Subscribers Signing the Articles.
- 169. Right to Original Issue of Same Corporation.

CONDITIONAL SUBSCRIPTIONS.

- 170. In General.
- 171. Condition as to Corporate Purposes.

- 172. Condition as to Amount Subscribed.
- 173. Performance and Materiality of Conditions.
- 174. Agreement to Repurchase Stock.
- 175. Waiver of Conditions.

SUBSCRIPTIONS OR SALES INDUCED BY FRAUD.

- 176. In General.
- 177. Rescission and Other Remedies.
- 178. Restoration of Value Received.
- 179. Defenses to Rescission.
- 180. Rescission After Insolvency.

WITHDRAWAL OR CANCELLATION OF SUBSCRIPTION.

- 181. In General.
- 182. Right as to Others Than Existing Creditors—Limitations of Right.

“BLUE-SKY” REGULATIONS.

- 183. In General.
- 184. Validity of Unauthorized Subscription and Issue.
- 185. Sale of Interest in Voluntary Trust.

IX. Transfers of Stock.

IN GENERAL.

- 186. Statutory Provisions.
- 187. Purpose of Statute.
- 188. Right to Transfer Shares.
- 189. Non-negotiability of Certificates.
- 190. Title of Finder or Thief.

PERSONS WHO MAY TRANSFER.

- 191. Married Women.
- 192. Agents or Attorneys.
- 193. Executors or Administrators.
- 194. Nonresident Owners.

MODE OF TRANSFER.

- 195. In General.
- 196. Indorsement and Delivery of Certificate.

- 197. Necessity for Delivery and Continued Possession.
- 198. Other Methods of Transfer.

RIGHT TO TRANSFER OR ENTRY ON THE BOOKS.

- 199. In General.
- 200. Demand and Refusal to Transfer in General.
- 201. Demanding Evidence of Authority to Transfer.
- 202. Delay in Making Transfer.
- 203. Adverse Claims as Ground for Refusing Transfer.
- 204. Existence of Liens as Ground for Refusal.
- 205. Equitable Action to Compel Transfer.
- 206. Refusal to Transfer as Conversion.
- 207. Mandamus to Compel Transfer.
- 208. Statutory Penalty for Refusal.
- 209. Irregular or Unauthorized Transfer on Books.

APPARENT OWNERSHIP OR POWER OF DISPOSITION.

- 210. In General.
- 211. Use of Word "Trustees."
- 212. Title Passed by Apparent Owner.

LEVY OF ATTACHMENT OR EXECUTION.

- 213. Attachment of Shares in General.
- 214. Mode of Attaching Shares.
- 215. Levy of Execution on Shares.

STOCK MADE APPURTENANT TO LAND.

- 216. In General.
- 217. Transfer of Title to Stock With Land.

PLEDGE OR MORTGAGE OF SHARES.

- 218. Mortgage.
- 219. Pledge in General.
- 220. Pledge Distinguished from Sale of Stock.
- 221. Rights and Liabilities of Pledgee.
- 222. Right to have pledge Entered on Books.

LEGAL EFFECTS OF UNREGISTERED TRANSFERS.

- 223. In General.

- 224. Passage of Title Between Parties.
- 225. Effect as Between Corporation and Parties to Transfer.
- 226. Rights Between Transferrer and Transferee.
- 227. Subsequent Bona Fide Transferees of Registered Holder.
- 228. Purchaser at Sheriff's Sale.
- 229. Priority of Attaching Creditor Before Sale.

X. Relation and Rights of Stockholders in General.

NATURE AND EXISTENCE OF RELATION.

- 230. In General.
- 231. Who may be Stockholders.
- 232. Contractual Nature of Relation.
- 233. Interest as Disqualifying Witness, Judge or Notary.
- 234. Stockholders' Relations Inter Sese.
- 235. Termination of Relation.

STOCKHOLDER'S INTEREST AND RIGHTS IN GENERAL.

- 236. Stockholder's Interest in the Corporation.
- 237. Rights of Stockholders in Corporate Property.
- 238. Stockholder's Dealings With Corporation.
- 239. Stockholders Acting for Corporation.
- 240. Acts Binding Corporation as Binding Stockholder also.
- 241. Acts of Majority Binding the Minority.
- 242. Enforcement of Rights by Stockholder.

INSPECTION OF CORPORATE RECORDS OR PROPERTY.

- 243. In General.
- 244. Nature and Extent of Right.
- 245. Reasons for Permitting Inspection.
- 246. Inspection of Corporate Property.
- 247. Motive or Purpose.
- 248. Who may Exercise Right.
- 249. Enforcement of Right.

RATIFICATION OF REAL PROPERTY TRANSACTIONS.

- 250. In General.
- 251. Essentials and Effect.
- 252. Attacking Validity of Transaction.

RIGHT TO DIVIDENDS.

- 253. In General.
- 254. Dividends from Profits.
- 255. Dividends of Mining Corporation.
- 256. Discretion of Directors as to Dividends.
- 257. Stock Dividends.
- 258. Persons Entitled in General.
- 259. Rights of Pledgor and Pledgee.
- 260. Rights of Purchasers or Creditors.
- 261. Rights of Life Tenant and Remainderman.
- 262. Action to Recover Dividend.

SUIT BY STOCKHOLDER ON BEHALF OF CORPORATION.

- 263. In General.
- 264. Cases in Which Relief may be Given.
- 265. Corporate Causes of Action.
- 266. Stockholder as Trustee for Purposes of Suit.
- 267. Demand on Corporation and Refusal.
- 268. Excusal of Demand.
- 269. Intervention Where Corporation Neglects Rights.
- 270. Persons Who may Sue as Stockholders.
- 271. Parties Plaintiff.
- 272. Parties Defendant.
- 273. Limitation of Actions.

XI. Stockholders' Meetings and Elections.

MEETINGS.

- 274. Notice in General.
- 275. Notice of Purpose.
- 276. Place of Meeting.
- 277. Waiver of Notice and Estoppel.
- 278. Duty to Call Annual Meetings.
- 279. Notice of Annual Meeting.
- 280. Time of Holding Annual Meeting.

ELECTIONS.

- 281. In General.
- 282. Attacks on Validity of Elections.
- 283. Persons Who may Attack Validity of Elections.

- 284. Adjournments—Postponement of Election.
- 285. Removal of Directors.

STOCKHOLDER'S RIGHT TO VOTE.

- 286. In General.
- 287. Record Holder of Stock.
- 288. Bona Fide Stockholder.
- 289. Pledgee, Trustee or Personal Representative.
- 290. Cumulative Voting.
- 291. Right to Vote by Proxy.
- 292. Restrictions on Proxies.
- 293. Separation of Voting Power and Ownership.
- 294. Voting Agreements.
- 295. Voting Trusts.

XII. Liability for Full Payment of Stock.

PAYMENT FOR CORPORATE STOCK.

- 296. In General.
- 297. Right to Issue Stock Without Full Payment.
- 298. Fictitious Stock.
- 299. Issue by Corporation in Financial Straits.
- 300. Validity and Effect of Agreements That Stock is Fully Paid.
- 301. Issuance of Certificate as Representation of Full Payment.
- 302. The "Trust Fund" Doctrine.
- 303. Fraud as Basis of Creditor's Rights.
- 304. Effect of Knowledge of Creditor.
- 305. Issue of Stock for Property.
- 306. Good Faith as to Valuation of Property.
- 307. Issue of Stock for Money.
- 308. Stock Issued for Services or to Pay Debts.
- 309. Stock Issued for Check or Note.
- 310. Stock Issued as a Bonus.

PERSONS LIABLE.

- 311. Original Subscribers.
- 312. Record Holders of Stock.
- 313. Liability of Transferee in General.
- 314. Transferee of "Watered" Stock.

- 315. Proof of Participation or Guilty Knowledge.
- 316. Insolvent Transferee.

ENFORCEMENT OF LIABILITY.

- 317. In General—Distinguished from Stockholder's Liability.
- 318. Enforcement of Subscription Contract by Corporation.
- 319. Enforcement by Assessment.
- 320. Remedy of Creditor in General.
- 321. Call by Corporation as Condition to Creditor's Suit.
- 322. Exhausting Legal Remedies Against Corporation.
- 323. Creditor as a Judgment Creditor.
- 324. Parties Plaintiff.
- 325. Parties Defendant.
- 326. Recovery by Creditor.

DISCHARGE OR LIMITATION OF LIABILITY.

- 327. In General.
- 328. Payment.
- 329. Offsets.
- 330. Forfeiture of Stock as Discharging Liability.
- 331. Accrual of Right of Action.
- 332. Statute of Limitations.

XIII. Assessments on Stock.

GENERAL CONSIDERATIONS.

- 333. In General.
- 334. Nature of Liability.
- 335. Who may Levy Assessment.
- 336. Levy by Insolvent Corporation.
- 337. Necessity for Strict Compliance.
- 338. Levy upon Subscribed Stock.
- 339. Levy on Fully Paid Stock.
- 340. Nonassessable Stock.

LIMITATIONS OR CONDITIONS OF LEVY.

- 341. Limitations on Power to Levy, in General.
- 342. Subscription of One-fourth of Stock.
- 343. Amount of Assessment.

- 344. Uniformity of Assessments.
- 345. Purposes of Assessment in General.
- 346. Particular Purposes of Assessments.

WHO ARE LIABLE.

- 347. Subscribers to Articles.
- 348. Record Holders of Stock.
- 349. Transferees.
- 350. Trustees.

LEVY AND ENFORCEMENT OF ASSESSMENT.

- 351. Order Levying Assessment.
- 352. Form of Notice of Assessment.
- 353. Publication and Service of Notice of Assessment.
- 354. Delinquency and Delinquent Notice.
- 355. Postponement of Delinquent Stock Sale.
- 356. Beginning Proceedings Anew After Irregularity.
- 357. Enforcement of Assessment by Sale of Stock.
- 358. Bidding and Purchase of Stock at Delinquent Sale.
- 359. Purchase by Corporation.
- 360. Enforcement by Action in General.
- 361. Waiver and Election to Proceed by Suit.
- 362. Discharge and Limitation of Liability.

ATTACK ON ASSESSMENT.

- 363. In General.
- 364. Attacking Void Assessment.
- 365. Attacking Irregular Proceedings for Sale.
- 366. Limitation on Action Attacking Assessment.

XIV. Liability of Stockholders and Members for Corporate Obligations.

GENERAL CONSIDERATIONS.

- 367. Basis of Liability.
- 368. Constitutional and Code Provisions.
- 369. Constitutionality of Code Provision.
- 370. Applicability to All Corporations.
- 371. Liability of Stockholders of Foreign Corporations, in General.

- 372. Absence of Declaration to Do Business in This State.
- 373. Kinds of Obligations for Which Stockholder may be Liable.

NATURE OF LIABILITY.

- 374. In General.
- 375. Liability as Contractual.
- 376. Comparison With Partnership Liability.
- 377. As Direct and Primary.
- 378. As Separate and Distinct from Corporate Liability.

MEASURE OF LIABILITY.

- 379. In General.
- 380. Stockholder's Proportion.
- 381. Subscribed Stock as Basis.
- 382. Time of Stockholding as Test.

PERSONS LIABLE.

- 383. In General.
- 384. Liability of Owner not of Record.
- 385. Stockholder Appearing as Such on Books.
- 386. When Stockholder on Books Excused from Liability—Estoppel.
- 387. Estates, Heirs, Legatees.
- 388. Persons Holding Stock in Representative Capacity, in General.
- 389. When Holder in Representative Capacity not Liable.
- 390. Corporations as Stockholders.

ACCRUAL AND LIMITATION.

- 391. In General.
- 392. Exclusive Application of Statute.
- 393. Liability Created by Law.
- 394. Time of Incurring as Time of Creation.
- 395. Effect of a Note or Account Stated.
- 396. Effect of Judgment Against Corporation.
- 397. Unilateral Contracts.
- 398. Effect of Extinguishment of Contract.
- 399. Creation of Right of Surety or Guarantor.
- 400. Breach of Covenants in Lease.
- 401. Miscellaneous Liabilities.
- 402. Application of Payments to Debts.

ACTIONS TO ENFORCE.

- 403. In General.
- 404. Creditors' Right—Right of Assignee.
- 405. Joinder of Parties and Causes of Action.
- 406. Jurisdiction and Venue.
- 407. Pleading and Proof of Indebtedness in General.
- 408. Judgment Against Corporation as Evidence.
- 409. Effect of Security Given by Corporation.
- 410. Evidence as to Stockholders.

DISCHARGE BY PAYMENT, RELEASE OR WAIVER.

- 411. Discharge by Payment.
- 412. Effect of Transfer of Stock.
- 413. Right to Contribution or Reimbursement.
- 414. Waiver of Liability by Creditor.

XV. Officers and Agents Generally.

QUALIFICATION, APPOINTMENT AND TENURE.

- 415. In General.
- 416. Qualifications of Directors.
- 417. Holding Stock Merely to Qualify.
- 418. Directors Named in the Articles—Certificate Naming Directors.
- 419. Tenure of Office in General.
- 420. Filling Vacancies in the Board.
- 421. Organization of the Board.
- 422. Number of Directors.

DE FACTO OFFICERS.

- 423. In General.
- 424. Nonstockholders as Directors.
- 425. Powers, Duties and Liabilities.
- 426. Validity of Acts of De Facto Officers.
- 427. Mode of Trying Title to Office.

MEETINGS OF DIRECTORS.

- 428. Notice in General.
- 429. Place of Meeting.
- 430. Regular Meetings.

- 431. Notice of Special Meetings.
- 432. Who may Call.
- 433. Adjourned Meetings.
- 434. Presumption of Regularity.
- 435. Duty of Secretary—Proof of Service.
- 436. Waiver of Notice of Meeting.

QUORUM.

- 437. In General.
- 438. Legal Effect of Unfilled Vacancies.
- 439. Interested Director as Part of Quorum.

MANAGEMENT OF CORPORATE AFFAIRS BY DIRECTORS.

- 440. In General.
- 441. Knowledge of Corporate Business—Dealings With Others Than Directors.
- 442. Delegation of Corporate Power by Directors.
- 443. Action of Directors Assembled as a Board.

FIDUCIARY RELATIONSHIP.

- 444. In General.
- 445. Relation to Stockholders in Private Dealings.
- 446. Inducements for Act or Vote.
- 447. Adverse Interests in General.
- 448. Vote of Interested Director.
- 449. Interlocking Directorates.
- 450. Dealing With Corporate Property.
- 451. Representative of Corporation Dealing With Himself.
- 452. Corporation Represented by Other Officers.
- 453. Officers as Creditors of Corporation.
- 454. Purchase of Claims Against Corporation.
- 455. Preferences Where Corporation is Insolvent.
- 456. Right to Avoid Transaction.
- 457. Accounting for Secret Profits—Estoppel.
- 458. Recovery on Quantum Meruit.

COMPENSATION.

- 459. In General.
- 460. Fixing of Salaries.

- 461. Implied Contract for Compensation.
- 462. Holding of Stock as Affecting Compensation.
- 463. Compensation of Directors, in General.
- 464. Extra or Onerous Services.

AUTHORITY OF OFFICERS AND AGENTS IN GENERAL.

- 465. In General.
- 466. Appointment and Term.
- 467. Pleading Corporate Contracts Sued upon.
- 468. Proof or Presumption as to Authority.
- 469. Necessity of Resolution, in General.
- 470. When Authority Required to be in Writing.
- 471. Ostensible or Apparent Authority.
- 472. Admissions.

PARTICULAR CORPORATE OFFICERS.

- 473. President, in General.
- 474. Powers of President.
- 475. Vice-president.
- 476. Secretary, in General.
- 477. Powers of Secretary.
- 478. Treasurer.
- 479. Executive Committee.
- 480. Manager in General.
- 481. Powers of Manager.
- 482. Limitation of Manager's Powers.

BONDS OF OFFICERS.

- 483. In General.
- 484. Term of Bond.
- 485. Liability on Bond for Defalcations.

IMPUTING KNOWLEDGE BETWEEN CORPORATION AND OFFICER.

- 486. In General.
- 487. Knowledge Outside Scope of Duties.
- 488. Effect of Adverse Interest of Officer.

RATIFICATION AND ESTOPPEL.

- 489. In General.

- 490. Knowledge of Material Facts.
- 491. Ratification in General.
- 492. Time for Ratifying or Disaffirming.
- 493. Who may Ratify.
- 494. Distinctions.
- 495. Express Ratification.
- 496. Implied Ratification.
- 497. Estoppel.

EXECUTION OF INSTRUMENTS.

- 498. In General.
- 499. Liability of Unauthorized Officer.
- 500. Personal Liability of Officer.
- 501. Specific Applications of Rules.
- 502. Promise in Corporate Name.
- 503. Signature of Directors or Trustees—Stockholders.
- 504. Parol Evidence.

XVI. Liability of Officers and Agents. In Vol. 7.

NONSTATUTORY LIABILITY.

- 505. In General.
- 506. Negligence.

STATUTORY LIABILITY IN GENERAL.

- 507. Statutory Provisions.
- 508. Necessity of Corporate Act.
- 509. Nature of Liability.
- 510. Effect of Amendment or Repeal.
- 511. Statute of Limitations.

DISTRIBUTION OR REDUCTION OF CAPITAL STOCK.

- 512. In General.
- 513. Purpose of the Statutory Provisions.
- 514. Meaning of "Capital Stock."
- 515. Illegality of Transactions.
- 516. Payment of Unlawful Dividends.
- 517. Reduction of Capital Stock.
- 518. Enforcement of Liability.
- 519. Necessity of Injury from Transaction.

DEBTS IN EXCESS OF SUBSCRIBED CAPITAL STOCK.

- 520. In General.
- 521. Validity of Excess Obligations.
- 522. Subscribed Capital Stock.
- 523. Debts Within Meaning of the Statute.
- 524. Enforcement of Liability.

CONSTITUTIONAL LIABILITY FOR MISAPPROPRIATIONS.

- 525. In General.
- 526. Nature of the Liability.
- 527. Meaning of "Misappropriations."
- 528. Enforcement by Suit in Equity.
- 529. Parties to Action to Enforce.

LIABILITY WITH RESPECT TO REPORTS.

- 530. False Reports in General.
- 531. Enforcement of Liability for False Reports.
- 532. Statutes Requiring Posting of Reports.
- 533. Nature and Purpose of Statutes.
- 534. Enforcement of Liability for Failure to Post.
- 535. Defenses to Action.

CRIMINAL LIABILITY.

- 536. In General.
- 537. Falsifying Corporate Records.
- 538. Promotion Frauds.
- 539. False Reports.
- 540. Illegal Distribution or Fictitious Payment of Stock.
- 541. Evidence of Criminal Liability.

XVII. Powers, Functions and Liabilities. In Vol. 7.

GENERAL SCOPE OF POWERS.

- 542. Code Constitutional Provisions.
- 543. General Limitations on Powers.
- 544. Exercise of Powers Under Extraordinary Circumstances.

ULTRA VIRES ACTS AND CONTRACTS.

- 545. In General.

- 546. Definition of Term "Ultra Vires"—Distinctions.
- 547. Attitude of Courts Toward Defense.
- 548. Doctrine of Federal Courts.
- 549. Acts Prohibited by Statute or Public Policy.
- 550. Acts Within Powers for Some Purposes.
- 551. Executory and Executed Contracts.
- 552. Basis of Liability on Executed Contracts.
- 553. Effect on Collateral Transactions.
- 554. Who may Urge Ultra Vires Against Corporation.
- 555. Restraining Ultra Vires Acts.
- 556. Recovery to Compensate for Benefits Received.

CONTRACTUAL POWERS.

- 557. In General.
- 558. Power to Create Debts.
- 559. Guaranty or Suretyship.
- 560. Entering into Partnership.
- 561. Contracts to Share Profit and Loss.
- 562. Contracts of Agency.

POWERS WITH REFERENCE TO PROPERTY.

- 563. In General.
- 564. Who may Question Necessity of Holding.
- 565. General Power With Respect to Realty.
- 566. Limitations on Holding Land.
- 567. Power to Take by Will.
- 568. Acquisition by Prescription.
- 569. Dedication of Land to Public Use.

DEALING IN CORPORATE STOCK.

- 570. Acquiring Stock of Other Corporations.
- 571. Corporation Purchasing Its Own Stock.

TRANSFER OR LEASE OF PROPERTY AS A WHOLE.

- 572. In General.
- 573. Purpose and Effect of Statute.
- 574. Consent of Stockholders.
- 575. Transfer or Lease as Including All Property.

TORTS AND CRIMES.

- 576. Torts.
- 577. Criminal Liability.
- 578. Jurisdiction in Criminal Actions.
- 579. Criminal Proceedings.

XVIII. Bonds and Bonded Indebtedness. In Vol. 7.

GENERAL CONSIDERATIONS.

- 580. Power to Incur Bonded Indebtedness—Definitions.
- 581. Negotiability or Transferability.
- 582. Restoring Lost or Destroyed Bonds.
- 583. Coupons.
- 584. Guaranty of Bonds.
- 585. Assumption of Bonded Indebtedness.

AUTHORIZATION OF BOND ISSUES.

- 586. In General.
- 587. Consent of Stockholders.
- 588. Constitutional and Code Provisions.
- 589. Authorization of an Original Issue by Meeting.
- 590. Authorization of an Original Issue by Written Assent.
- 591. Consolidated Bonded Indebtedness.
- 592. Certificate of Creation or Increase.
- 593. Effect of Noncompliance With Law.
- 594. Authorization of Corporation Commissioner.

ISSUE OF BONDS.

- 595. In General.
- 596. Sale of Bonds.
- 597. Issue in Pledge.
- 598. Interim Certificates.

MORTGAGE OR DEED OF TRUST.

- 599. In General.
- 600. Provisions Accelerating Maturity.
- 601. Trustee.
- 602. Duties of Trustee in Foreclosure.
- 603. Action by Bondholder—Demand on Trustee.

- 604. Right of Action of Coupon Holder.
- 605. Foreclosure in General.
- 606. Remedies Aside from Foreclosure—Possession or Sale.
- 607. Rights and Priorities Between Bondholders.
- 608. Sale to Bondholders and Reorganization.

XIX. Actions by and Against Corporations. In Vol. 7.

IN GENERAL.

- 609. Powers as to Suit and General Considerations.
- 610. Pleadings.
- 611. Verification.
- 612. Affidavits or Oaths.
- 613. Injunctions to Suspend Business.

VENUE OF ACTIONS AGAINST CORPORATIONS.

- 614. Constitutional Provision.
- 615. Purpose of Constitutional Provision.
- 616. Construction of Provision.
- 617. Conflict With Federal Constitution.
- 618. Applicability to Cases of Contracts and Torts.
- 619. Real and Quasi-real Actions.
- 620. Venue in County of Residence.
- 621. Contractual Actions.
- 622. Actions for Torts.
- 623. Presumption and Proof.
- 624. Rights of Other Defendants—Waiver.
- 625. Right to Change of Place of Trial.
- 626. Actions Against Foreign Corporations.

XX. Dissolution or Forfeiture. In Vol. 7.

GENERAL CONSIDERATIONS.

- 627. Modes and Grounds for Dissolution.
- 628. Effect of Dissolution.
- 629. Judgment Against Dissolved Corporation.
- 630. Estoppel to Attack Judgment.

VOLUNTARY DISSOLUTION.

- 631. In General.

- 632. Application or Petition.
- 633. Notice, Hearing and Decree.
- 634. Objections or Opposition.
- 635. Proof.

INVOLUNTARY DISSOLUTION OR FORFEITURE.

- 636. In General.
- 637. Grounds and Classes of Forfeiture in General.
- 638. Modes of Effecting Forfeitures—Self-executing Statutes.
- 639. Expiration of Charter.
- 640. Forfeiture for Noncompliance With License Tax Act.
- 641. Forfeiture for Failure to Pay Franchise Tax.
- 642. Pleading and Proof of Forfeiture.
- 643. Revivor in General.
- 644. Revivor of Rights Forfeited Under Former Acts.
- 645. Failure to Effect Organization—Cessation of Business.
- 646. Defective Incorporation.

QUO WARRANTO PROCEEDINGS.

- 647. In General.
- 648. Writs.
- 649. Parties Defendant.
- 650. Pleading.
- 651. Judgment.
- 652. Limitation and Estoppel.

WINDING UP AFFAIRS.

- 653. In General.
- 654. Statutory Provisions in This State.
- 655. Directors as Trustees in Liquidation.
- 656. Right of Trustees to Administer—Extent of Powers of the Court.
- 657. Determination of Who are Trustees.
- 658. Title to Property of Dissolved Corporation.
- 659. Mode of Action by Trustees.
- 660. Creditors' Rights.
- 661. Suit by the Trustees.
- 662. Suit Against Trustees.
- 663. Necessity for Substitution of Trustees.
- 664. Powers and Duties in General.

- 665. Sale of Property.
- 666. Conveyances.
- 667. Suit to Enforce Duties of Trustees.
- 668. Compensation and Expenses.
- 669. Right of Stockholder in Distribution.

XXI. Receivers. In Vol. 7.

- 670. In General.
- 671. Statutory Provisions.
- 672. Jurisdiction of Court.
- 673. Remedy as Ancillary.
- 674. Grounds of Appointment in General—Security.
- 675. Appointment upon Dissolution.
- 676. Under Usages of Equity.
- 677. Receiver for Specific Property.
- 678. Persons Who may Ask Receiver on Dissolution.

XXII. Foreign Corporations. In Vol. 7.

IN GENERAL.

- 679. Scope of Chapter.
- 680. What are Foreign Corporations.
- 681. As "Person" or "Citizen."
- 682. As "Absent."
- 683. Residence.
- 684. Domestication.

RIGHTS AND POWERS GENERALLY.

- 685. Rule of Comity.
- 686. Extent and Limitations of Rule.
- 687. Exercise of Powers—Eminent Domain.

RESTRICTIONS AND CONDITIONS.

- 688. Right to Prescribe Conditions.
- 689. Classification and Discrimination.
- 690. General Limitations on Power to Restrict.
- 691. Interstate Commerce.
- 692. General Nature and Construction of Restrictions.
- 693. Filing Articles or Charter.

6 Cal. Jur.

CORPORATIONS.

- 694. Designation of Agent for Process.
- 695. Repeal of Acts.
- 696. Withdrawal of Foreign Corporation.

NONCOMPLIANCE WITH CONDITIONS.

- 697. In General.
- 698. Pleading and Proof of Noncompliance.
- 699. Maintenance or Defense of Actions.
- 700. Benefit of Statute of Limitations.

PROHIBITION OF DISCRIMINATION AGAINST DOMESTIC CORPORATIONS.

- 701. In General.
- 702. Organization or Internal Affairs.
- 703. Transacting Business.

WHAT CONSTITUTES "DOING BUSINESS."

- 704. In General.
- 705. Single Act or Act Outside Ordinary Business.
- 706. Illustrations of "Doing Business."

ACTIONS.

- 707. Jurisdiction in General.
- 708. Jurisdiction as to Business Done in This State.
- 709. Security for Costs.

XXIII. Taxation. In Vol. 7.

IN GENERAL.

- 710. Constitutional and Statutory Provisions.
- 711. Miscellaneous Taxes.
- 712. Filing Fees.

LICENSE TAX.

- 713. In General.
- 714. Corporations Subject to Tax—Exemptions.
- 715. Corporations Doing Interstate Business.
- 716. Amount of Tax.
- 717. Time of Payment—Penalties.
- 718. Effect of Illegal Tax—Remedy.

FRANCHISE TAX.

- 719. In General.
- 720. Constitutional and Statutory Provisions.
- 721. Corporate Franchise and Goodwill.
- 722. Valuation of Franchise—To Whom Assessed.
- 723. "Franchise" as Corporate Excess.
- 724. Foreign Corporations and Federal Franchises.

SHARES OF STOCK.

- 725. In General.
- 726. Construction of Statute.
- 727. Constitutionality of Statute.
- 728. Situs of Shares for Taxation.
- 729. Corporations Holding Property Out of State.

I. INTRODUCTORY.

General Considerations.

§ 1. **Scope of Article.**—The growth and scope of the activities of corporations,¹ have been so rapid and extensive in modern times that at this day the law of corporations is necessarily intertwined with many other subjects. The scope of this article embraces only the rights, duties, powers and liabilities of private corporations and their components generally, and those matters which are peculiar to the corporate form of organization as distinguished from other forms, such as partnerships, for instance,² and from those rules of law applicable as fully to individuals as to corporations.

Many other heads of the law involve rules applicable to corporations, which are more properly treated in this work under special titles. Thus, the matter of service of process on corporations is dealt with in another article,³ although the venue of actions is here treated.⁴

1. See *infra*, § 6.

3. See *PROCESS*.

2. See *JOINT STOCK COMPANIES*;
PARTNERSHIP. As to public corporations, see *MUNICIPAL CORPORATIONS*.

4. See *infra*, § 614 et seq.

The subject of bonds and their issue by corporations is dealt with herein,⁵ as is also the bonding of corporate officers,⁶ although the general subjects of common-law bonds and suretyship are treated under their proper heads.⁷ The insolvency and bankruptcy of corporations are also considered in another connection.⁸ Although certain forms of taxation peculiar to corporations are dealt with herein,⁹ general matters of taxation are fully covered by another article.¹⁰ Likewise, those cases of receiverships in general related to the dissolution of corporations, and not common to partnerships or individuals, are treated in this article,¹¹ while the main subject of receivers is dealt with under its proper head.¹² The subject of franchises is also treated elsewhere.¹³ And the rights, duties and powers of agents and officers of corporations are treated of in this article only to the limited extent necessary,¹⁴ while the general subject of agency is fully covered elsewhere.¹⁵

The diversified kinds of corporations, with respect to the class of business transacted by them, or with respect to their inherent character, requires the full treatment of particular classes of corporations under more appropriate titles.¹⁶ But the subject of foreign corporations is covered by this article,¹⁷ as are also homestead corporations¹⁸ and industrial loan companies.¹⁹ While matters pertaining to

5. See *infra*, § 580 et seq.

6. See *infra*, § 483 et seq.

7. See *Bonds*, vol. 4, p. 350.

8. See *BANKRUPTCY*, vol. 4, p. 48; *INSOLVENCY*.

9. See *infra*, § 710 et seq.

10. See *TAXATION*.

11. See *infra*, § 670 et seq.

12. See *RECEIVERS*.

13. See *FRANCHISES*.

14. See *infra*, title XV.

15. See *AGENCY*, vol. 1, p. 683.

16. See *ASSOCIATIONS*, vol. 3, p. 345; *BANKS*, vol. 4, p. 92; *BUILDING*

AND LOAN ASSOCIATIONS, vol. 4, p. 644; *CEMETERIES*, vol. 4, p. 993; *CHARITIES*, vol. 5, p. 1; *GAS*; *INSURANCE*; *MUNICIPAL CORPORATIONS*; *MUTUAL BENEFIT SOCIETIES*; *RAILROADS*; *RELIGIOUS SOCIETIES*; *SLEEPING-CAR COMPANIES*; *STREET RAILWAYS*; *TELEGRAPHS AND TELEPHONES*; *WATERS*; and other specific titles. And see *infra*, § 21, as to classification of corporations.

17. See *infra*, § 679 et seq.

18. See *infra*, § 26.

19. See *infra*, § 27.

subscriptions or sales by a corporation of stock induced by fraud are here considered,²⁰ reference is made to other articles for treatment of the many questions concerning rights and remedies where fraud is found in sales of stock between individuals.¹

§ 2. General Survey.—The law of corporations in the state of California conforms in general to the rules in other states; that is, the general body of the law is not peculiar, even though certain features of the California law may be said to be almost *sui generis*. Of course, the particular rules as to incorporation and organization,² which are purely statutory and formal, necessarily differ in detail from those of other states, although the same general plan of organization is common. And the same may be said as to the statutes relating to admission of foreign corporations to do business in this state.³ Likewise, every state has its own system of taxation, although certain general principles may govern, and the mode of enforcement and collection of taxes levied on corporations may, therefore, differ from the methods adopted by other states.⁴

If the system of corporation law in California can be said to differ greatly from that in force in the larger number of states, it is not in respect to the visitation and regulation of corporations⁵—for other states have similar regulations, including “blue sky” laws⁶—but rather in respect to the liability imposed upon stockholders and directors. The liability of stockholders for the full payment of their stock, both to the corporation and to creditors of the corporation,⁷ is common in other states, and the enforcement of that liability and of a liability for payment of expenses and debts by means of a levy of assessments⁸ is not unusual; but the individual liability of stockholders for their

20. See *infra*, §§ 176–180.

1. See CANCELLATION; CONTRACTS;
FRAUD AND DECEIT; SALES.

2. See *infra*, § 28 et seq.

3. See *infra*, § 679 et seq.

4. See *infra*, § 710 et seq.

5. See *infra*, § 10.

6. See *infra*, §§ 183–185.

7. See *infra*, § 296 et seq.

8. See *infra*, § 333 et seq.

proportion of the debts and liabilities incurred by the corporation during the time they are such stockholders, imposed by the constitution and statutes of the state of California,⁹ is unknown in other jurisdictions. Some one or two states impose a somewhat similar liability under particular conditions, as in Colorado, but no other jurisdiction seems to provide the full, absolute liability imposed by California constitution and laws, which have obviously been designed to afford creditors full opportunity to enforce their claims against the corporation or those who constitute it. And the liability of directors imposed by the laws of California, although similar to that imposed by the laws of many other states, probably exists in but few states to the full extent prevailing in California.¹⁰ Such legislation was no doubt intended not only as additional assurance to creditors, and in some cases to the stockholders, but to insure the active control and responsibility involved in the legislative mandate that "the corporate powers, business and property of all corporations must be exercised, conducted, and controlled" by the board of directors.¹¹

§ 3. Definition and General Attributes.—By the Civil Code

"A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes."¹²

The term as used in the constitution is construed as including all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships.¹³ Many attempts have been made to define and set forth the essential characteristics of a corporation,¹⁴ but the definition most often

9. See *infra*, § 367 et seq.

10. See *infra*, § 507 et seq.

11. See *infra*, § 441.

12. Civ. Code, § 283.

13. Const., art. XII, § 4.

14. See 7 B. C. L., pp. 24-25.

quoted is that of Chief Justice Marshall in the Dartmouth College Case:

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual."¹⁵

Being a creature of the law, the rights, powers and duties of a corporation are conferred and defined by statute, and without such statutory authority it cannot exist or transact business.¹⁶ It may contract, incur debts, employ servants and agents and perform many other acts which pertain to natural persons. It is also endowed with a corporate name and has succession. These are the principal attributes of a corporation.¹⁷ It is a mere legal entity existing solely in legal contemplation and created for the convenience and benefit of the stockholders,¹⁸—an artificial person,¹⁹ which can act only through its members, officers or agents,²⁰ and which can have no knowledge or belief on any subject independent of the knowledge or belief of its agents.¹ With the exception of corporations

15. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, see also, Rose's U. S. Notes.

16. Boca Mill Co. v. Curry, 154 Cal. 326, 97 Pac. 1117; People v. Dashaway Assn., 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277; Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Dean v. Davis, 51 Cal. 406.

17. See *infra*, § 557 et seq., as to powers and functions.

18. Kennedy v. California Sav.

Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 246.

19. Dearborn v. Grand Lodge, 138 Cal. 658, 72 Pac. 154; Stevens v. Selma Fruit Co., 18 Cal. App. 242, 123 Pac. 212.

20. Dearborn v. Grand Lodge, 138 Cal. 658, 72 Pac. 154. See *infra*, §§ 440-443. 465-472.

1. San Francisco Gas Co. v. San Francisco, 9 Cal. 453. As to imputing agent's knowledge to corporation, see *infra*, § 486 et seq.

sole, corporations consist of aggregates of individuals united for some legitimate business.² The distinguishing characteristic of a corporation, however, is the separate corporate entity—its existence separate and apart from the individuals who compose its membership and from all other persons.³

§ 4. Corporation as a "Person."—The word "person" in its legal signification is a generic term, and includes artificial as well as natural persons.⁴ A corporation, both by the civil and the common law, is a person.⁵ Section 14 of the Civil Code provides that the word "person" includes a corporation,⁶ whether public or private;⁷ and the word "person" as used in penal statutes includes corporations.⁸ Furthermore, a corporation is a person within the meaning of the fourteenth amendment to the federal constitution,⁹ even though organized under the laws of another

2. *The Railroad Tax Cases*, 13 Fed. 722, 8 Sawy. 238. See *infra*, § 22, as to corporations sole.

3. See *infra*, § 11 et seq; also *infra*, § 230 et seq.

4. *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865 (under Code Civ. Proc., § 412, providing for publication of summons); *People v. City of Riverside*, 66 Cal. 288, 5 Pac. 350; *Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 304 (statute providing for publication of summons).

5. *Tonchard v. Tonchard*, 5 Cal. 306.

6. *City Savings Bank v. Enos*, 135 Cal. 167, 67 Pac. 52; *Robinson v. Southern California Ry. Co.*, 129 Cal. 8, 61 Pac. 947; *City of Los Angeles v. Leavis*, 119 Cal. 164, 51 Pac. 34; *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Western Union Tel.*

Co. v. Superior Court, 15 Cal. App. 679, 115 Pac. 1091, 1100. And see *Merced Bank v. Ivett*, 127 Cal. 134, 59 Pac. 393, holding that the word "debtor" as used in the statutes must include corporations equally with individuals and partnerships.

7. *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604 (under Civ. Code, § 1001, relating to acquisition of property by eminent domain proceedings).

8. Pen. Code, § 7. And see *People v. Western Meat Co.*, 13 Cal. App. 539, 110 Pac. 338, and *Western Meat Co. v. Superior Court*, 9 Cal. App. 538, 99 Pac. 976, holding that under sections 1390-1396 of the Penal Code it is required that upon a presentment against a corporation, the magistrate must issue a summons in the same manner as in the case of a natural person.

9. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L.

state.¹⁰ And so, whenever a provision of the constitution or law guarantees to persons the enjoyment of property or affords to them means for its protection or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and the courts look beyond the name of the corporation to the individuals whom it represents.¹¹

§ 5. Distinguished from Other Associations.—Corporations, under American laws, have been said to be little more than joint stock companies under the English law; in their true nature, indeed, more nearly resembling limited partnerships under special articles than corporations at common law.¹² This statement, however, is correct only in a qualified sense,¹³ e. g., with respect to the personal liability of stockholders for debts of the corporation.¹⁴ The right of a member to sue the corporation has never been doubted, and in this very right consists one of

Ed. 118, 6 Sup. Ct. Rep. 1132, sec. also, *Rose's U. S. Notes; The Railroad Tax Cases*, 13 Fed. 722, 8 Sawy. 238; *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304; *Thompson v. San Francisco Gas etc. Co.*, 34 Cal. App. 699, 168 Pac. 390. See *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188, 59 L. R. A. 581, 67 Pac. 1040, 70 Pac. 1083, *McFarland, J.*, dissenting, to same effect. See *Central Pac. R. Co. v. State Board of Equalization*, 60 Cal. 35, contra, holding the provisions of the fourteenth amendment applied to natural persons only. That this case is no longer regarded as law in view of the subsequent decisions of the United States supreme court is indicated in *Grocers' Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120.

10. *American etc. Wireless Tel. Co. v. Superior Court*, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15.

11. *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304 (holding that the word "corporation" refers to the members who constitute the corporation and the rights of a corporation are to be measured by the same laws as the rights of a person); *Skinner v. Garnett Gold Min. Co.*, 96 Fed. 735; *The Railroad Tax Cases*, 13 Fed. 722, 2 Sawy. 238. See *CONSTITUTIONAL LAW*, vol. 5, p. 854.

12. *Chater v. San Francisco Sugar Refining Co.*, 19 Cal. 219.

13. *Robinson v. Bidwell*, 22 Cal. 379, *Crocker, J.*, concurring.

14. *Mokelumne Hill etc. Min. Co. v. Woodbury*, 14 Cal. 265.

the essential differences between corporations and mere partnerships, for in the latter one partner cannot sue in an action at law, but must file his bill in equity for a dissolution and an accounting.¹⁵ And this is also true of a joint stock company which is governed by the general law of partnership where there is nothing in the constitution of the company to regulate remedies of shareholders between themselves.¹⁶ In respect to liability of stockholders, a corporation and a joint stock association have been placed on the same footing by the constitution.¹⁷

Certain features of corporations are present in mining partnerships which differ from ordinary commercial partnerships in that there is no dissolution upon a conveyance of interest of one partner or death of a partner,¹⁸ and no power in one partner to bind the other partners generally.¹⁹ Likewise in such partnerships, a majority in interest may control.²⁰ Although an unincorporated association doing business under a declaration of trust after the plan of the so-called "Massachusetts trust" is not a corporation, yet the shareholders in such an association are entitled to certain rights which stockholders in corporations have;¹ and such organizations have been subjected to some of the regulatory statutes enacted with reference to corporations, such as the "blue sky" law.²

15. *Barnstead v. Empire Min. Co.*, 5 Cal. 299. See PARTNERSHIP.

16. *Bullard v. Kinney*, 10 Cal. 60.

17. Const., art. XII, § 3.

18. *Taylor v. Castle*, 42 Cal. 367; *Jones v. Clark*, 42 Cal. 180; *Duryea v. Burt*, 28 Cal. 569; *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96.

19. *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107 (ditch company); *Duryea v. Burt*, 28 Cal. 569; *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96.

20. *Dougherty v. Creary*, 30 Cal.

290, 89 Am. Dec. 116. See MINES AND MINERALS.

1. See *McMillan v. Greenamyer*, 34 Cal. App. Dec. 83, 195 Pac. 734, holding that a shareholder in such a trust has the right to maintain a defense in behalf of such association upon a showing that the trustees were colluding to enforce an illegal demand against the association.

2. In *re Girard*, 62 Cal. Dec. 245, 200 Pac. 593, where it is said, in holding the provisions of the act applicable to voluntary trusts to be

§ 6. Growth of Corporate Activity.—It has been judicially recognized that corporations, under the system of general incorporation laws, have multiplied beyond all precedent;³ and not only have they increased in number, but their activities have extended to nearly every class of business pursuit known to the modern commercial and industrial world,⁴ until now it is a fact of common knowledge that a very large part of the business of the country is, as a matter of convenience if not, indeed, as a matter of necessity, carried on by corporate organizations.⁵

§ 7. Power of State Over Corporations.—It has been said that the act of incorporation, instead of being as formerly a favor granted by the sovereign to the subject, has under our system become a matter of right available under general laws,⁶ which statutory right is free to everybody.⁷ Nevertheless, a corporation is purely a creature of the law and may exist only by permission of the state,⁸ and the right to engage in business can be exercised through the agency of a corporation only by express permission of the state and then only for such purposes as may be authorized.⁹ There is, then, no natural right in

constitutional: "Conceding that the business intended to be done would be legitimate and lawful, it is evident from the experience of mankind that it is of a character which renders it justly subject to regulation, as much so as that of the corporations towards which the law is principally directed." See "Corporate Securities Act," Stats. 1917, p. 673, amended Stats. 1919, p. 231.

3. *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398. And see cases cited *infra*.

4. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946; *Greig v. Rioridan*, 99 Cal. 316, 33 Pac. 550.

5. *Otis Elevator Co. v. First Nat.*

Bank, 163 Cal. 31, 41 L. R. A. (N. S.) 529, 124 Pac. 704; *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 9, 124 Pac. 875. And see *The Railroad Tax Cases*, 13 Fed. 722, 8 Sawy. 238, in which Mr. Justice Field set forth the wide scope of corporate activities.

6. *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

7. *Chater v. San Francisco Sugar Refining Co.*, 19 Cal. 219.

8. *Boca Mill Co. v. Curry*, 154 Cal. 326, 97 Pac. 1117.

9. *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832.

citizens to do business in a corporate name;¹⁰ and the state has the sole power to determine upon what conditions corporations may be created and exist within its borders.¹¹ The right to be and exist as a corporation is a franchise,¹² which may be granted or refused by the sovereign power upon such terms as it sees fit.¹³ Although the law provides that private corporations may be formed by a certain number of persons, a majority of whom are residents of the state, for any purpose for which individuals may lawfully associate themselves, each corporation so created derives its right to exist as a corporation, with all its incidents, directly from the sovereign power.¹⁴

§ 8. Power of the Legislature.—The power of creating corporations is one appertaining to sovereignty and can be exercised only by that branch of the government in which it is legally vested.¹⁵ In England, a corporation formerly existed under a special grant from the king, and later under special act of parliament;¹⁶ but in this country the right to incorporate comes from the legislature.¹⁷ And it is the rule in America that, except in so far as it is limited by constitutional provision, the power of the legis-

10. *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380.

11. *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

See note, 9 A. L. R. 1341, as to power of legislature to investigate conduct of private corporation.

12. *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69.

13. *City Properties Co. v. Jordan*, 163 Cal. 587, 126 Pac. 351.

14. *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832. See *infra*, § 28 et seq.

15. *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832.

16. *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; *London & S. F. Bank v. Block*, 117 Fed. 900.

17. *Boca Mill Co. v. Curry*, 154 Cal. 326, 97 Pac. 1117; *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; *Huntington v. Curry*, 14 Cal. App. 468, 112 Pac. 583; *London & S. F. Bank v. Block*, 117 Fed. 900.

lature in this regard is absolute.¹⁸ The incorporation of companies is not judicial, but ministerial, and under the California constitution is a legislative act; hence this function cannot be imposed upon the judiciary. Even admitting that the power of incorporation under general laws could be delegated, it must be to some persons or body possessing legislative functions, and cannot be to a court which is inhibited from the performance of any other than judicial acts.¹⁹

§ 9. Limitation on Power of Legislature.—While it has been said that domestic corporations, as well as foreign corporations, act as such within the state purely by grace and not by right, depending absolutely upon the consent of the state for the enforcement of their contracts, which assent may be withheld or permitted upon such terms as the state shall choose,²⁰ yet the power of the legislature over corporations is not absolutely unlimited. It has been said to be difficult to say precisely just where the line is to be drawn; but this much at least is true, that where legislation affecting corporations comes into conflict with the stipulations of valid treaties and with the national constitution and laws made in pursuance thereof, it must yield to their superior authority. And where a contract has been made or property acquired by lawful exercise of the granted powers, the contract is as inviolable and the right

18. *Boca Mill Co. v. Curry*, 154 Cal. 326, 97 Pac. 1117.

19. *People v. Town of Nevada*, 6 Cal. 143. As to separation of the powers of government, see CONSTITUTIONAL LAW, vol. 5, p. 672 et seq.

20. *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380. But see Const., art. XII, § 15, to the effect that foreign corporations shall not be allowed to transact business within the state on more favorable conditions than are prescribed by

law to similar corporations organized under the laws of the state. And see *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, holding that this constitutional provision was not designed to limit the powers of the legislature when dealing with the organization and government of domestic corporations. And *London & S. F. Bank v. Block*, 117 Fed. 900, holding that under this constitutional provision a foreign corporation's right to do business is taxable.

of property, with everything incidental to that right, is as sacred as in the case of natural persons.¹ Under the rule that a statute, in the creation of corporations, may not withdraw them from the guaranties of the federal constitution,² a foreign corporation by doing business in California does not waive the right to object to the unconstitutionality of a condition.³ But the fact that failure to comply with the provisions of the law ipso facto works a forfeiture of the charter of a corporation without any opportunity to be heard does not bring the statute prescribing such forfeiture into conflict with the due process provisions of the federal and state constitutions.⁴

Power of the legislature to amend or repeal charters of corporations organized in California does not authorize it to deprive a corporation of the rights guaranteed to it by the federal constitution, to due process of law and to the equal protection of the laws; nor has the legislature any power to alter, amend, or repeal the charters of foreign corporations doing business in this state.⁵ Neither may the legislature discriminate against corporations in favor of individuals.⁶ And while it is justified in making reasonable classification of corporations, for the purpose of legislation,⁷ such classification must be founded upon some

1. In re Parrott, 1 Fed. 481, 6 Sawy. 349. See CONSTITUTIONAL LAW, vol. 5, p. 759.

2. The Railroad Tax Cases, 13 Fed. 722, 8 Sawy. 238.

3. San Francisco v. Liverpool etc. Ins. Co., 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380. See infra, §§ 679-709.

4. Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341.

5. Johnson v. Goodyear Min. Co., 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304.

6. Steinhart v. Superior Court,

137 Cal. 575, 92 Am. St. Rep. 183, 59 L. R. A. 404, 70 Pac. 629 (where statute was held applicable to other persons as well as to private corporations).

7. Marin etc. Water Dist. v. Marin Water etc. Co., 178 Cal. 308, 173 Pac. 469; San Luis Obispo County v. Murphy, 162 Cal. 588, Ann. Cas. 1913D, 712, 123 Pac. 808 (legislature may reasonably conclude that in reality the corporations classified "compose the entire class" as to which legislation is made).

constitutional or natural distinction, which suggests a reason to justify the diversity of legislation respecting them.⁸

§ 10. Examination or Visitation.—The attorney general or district attorney, whenever and as often as required by the governor, is required by statute to examine into the affairs and condition of any corporation in California and make a report to the governor to be laid before the legislature, and in the exercise of such power they may examine books, papers and documents.⁹ The legislature, or either branch thereof, may examine into the affairs and condition of any corporation, and a legislative committee may examine officers under oath and the safes, books, and papers of the corporation.¹⁰ This power may be called a visitorial or supervisory power.¹¹ The attorney general is also given power to examine all books and papers of any corporation in his investigations for the discovery of property which should escheat to the state.¹² The commis-

8. *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304 (holding that there is no reason to justify the arbitrary selection of corporations doing business in this state in order to subject their property to a lien not enforceable against other persons under like circumstances, and to prohibit them from making defenses which other persons may make, and requiring them to pay attorney's fees in an action at law from which other persons are exempt, and forbidding them and their employees to make contracts which other persons may make; and such arbitrary selection cannot be justified by calling it classification); *Slocum v. Bear Valley Irr. Co.*, 122 Cal. 555, 68 Am. St. Rep. 68, 55 Pac. 403; *Omnibus R. Co. v. Baldwin*, 57 Cal. 160; *Board of Directors of Woman's Re-*

lief Corps etc. Assn. v. Nye, 8 Cal. App. 527, 97 Pac. 208 (holding that the "veterans of the Civil War," under Statutes of 1897, page 447, chapter 274, constitute class founded upon natural distinction). And see *infra*, § 21. As to classification, in general, see *CONSTITUTIONAL LAW*, vol. 5, p. 823 et seq.

9. Civ. Code, § 382.

10. Civ. Code, § 383.

11. *Application of Bunkers*, 1 Cal. App. 61, 81 Pac. 748, holding that the legislature has power under section 1, article XII, of the constitution, and section 383, Civil Code, to investigate the affairs of all corporations of this state. See *infra*, § 133.

12. Pol. Code, § 474; *People v. German Savings & Loan Soc.*, 72 Cal. 28, 13 Pac. 51; *People v. Hibernia Sav. & Loan Soc.*, 72 Cal. 21, 13 Pac. 48 (holding that section 474,

sioner of corporations is empowered to make examinations of corporations under the "corporate securities act"—commonly known as the "blue sky law."¹³ The state controller and inheritance tax attorneys are authorized by the inheritance tax act to make certain examinations and inspections for the purpose of acquiring information deemed necessary or desirable for the proper enforcement of the act.¹⁴ And statutory authority is likewise given the board of equalization or its appointed representative to examine the books and accounts of corporations and to inspect their property for the purpose of carrying into effect the provisions of the law for assessing such corporations under section 14 of article XIII of the constitution.¹⁵

Corporate Entity.

§ 11. **In General.**—The very essence of a corporation consists in its corporate succession, which in stock companies is kept up by the substitution of one owner for another in the proprietorship of the corporate shares.¹⁶ The corporation has been declared, however, to be nothing more than its stockholders or members, transformed into and existing as one legal being by permission of the state. The incorporators and their associates and successors are the "body politic or corporate by the name stated in the certificate" referred to in section 296 of the Civil Code, and as such body they hold the right to exist and transact the business specified in the articles; but this right is held in their collective capacity as a corporation, and not severally as persons. They have no rights in regard to the corporate franchise that they can exercise, except through

Political Code, does not authorize the attorney general, or counsel appointed by him, to examine the books and papers except under the order and supervision of the court).

13. Stats. 1917, p. 673, § 4.

14. Stats. 1917, c. 589.

15. Pol. Code, § 3669e.

16. *Visalia etc. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; *Dean v. Davis*, 51 Cal. 406 (holding that this succession is one of the principal attributes of a corporation).

the corporation.¹⁷ The members of the corporation, as natural persons, are merged in this corporate entity;¹⁸ and it is the general rule that a corporation is an entity separate and distinct from its stockholders,¹⁹ and directors.²⁰ Thus, a stockholder, even though a principal one, is not in legal contemplation the employer of those working for the corporation; and it is equally clear that the holder of a minute fraction of the stock of a corporation from which he is receiving wages is not his own employer in any substantial sense.¹ Pursuant to the general rule, the ownership of a majority of the stock does not make one the owner of the corporate franchises, and hence he cannot convey or assign them.² For like reason the agreement of the principal stockholder to pay a note of the corpora-

17. *Bank of California v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832.

18. See, *infra*, § 230 et seq., as to relation of stockholder. See article on "Limitations of the Theory of Corporate Entity in California," 4 Cal. Law Rev., p. 465.

19. *Erkenbrecher v. Grant*, 62 Cal. Dec. 302; *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Curtiss v. Murry*, 26 Cal. 633; *Escondido Lumber etc. Co. v. Baldwin*, 2 Cal. App. 608, 84 Pac. 284.

20. *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7 (sale by trustees, under deed of trust, to the corporation is not a sale to themselves even though they are directors and stockholders). See *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 73 Pac. 745,

where facts were similar to those in the *Copsey* case, *supra*. But see *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822, *contra*, where a trustee was a stockholder and director of a corporation, and it was held that the investment of trust funds in the bonds of such corporation was in effect a dealing with the funds of the beneficiary for the trustee's own advantage—a loan of money to himself. See *infra*, § 12, as to limitations of the rule.

1. *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 16 Ann. Cas. 1165, 21 L. R. A. (N. S.) 550, 98 Pac. 1027.

2. *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458, (saying that if such fact made him owner of the franchises, an owner of the majority of the stock would be a trustee of the other stockholders; however, there is no rule of law that would justify any such conclusion). See *FRANCHISES*.

tion is void as against the corporation for lack of consideration.³

§ 12. Disregard of Corporate Entity in General.—As a practical matter, of course, the existence of a corporation independent of its shareholders is a mere fiction; its rights and duties are in reality the rights and duties of persons who compose it and not of an imaginary being.⁴ And while it is the general rule that a corporation is an entity separate and distinct from its stockholders, it is equally settled that both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard this distinct existence and treat them as identical.⁵ In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own the capital stock, it is not enough that the company is so organized and controlled and its affairs so managed as to make it “merely an instrumentality, conduit or adjunct of its stockholders, but it must further appear that they are the business conduits and alter ego of one another and that to recognize their separate entities would aid the consummation of a wrong.” So, where there is no evidence that the organization of a corporation and the transfer of property to it is in manner fraudulent or prompted by dishonesty or that the company committed or intended to commit any fraud, even though controlled by one man, the corporate entity cannot be disregarded.⁶

3. *Sherwood v. Lowell*, 34 Cal. App. 365, 167 Pac. 554. See *Porter v. Lassen County etc. Cattle Co.*, 127 Cal. 261, 59 Pac. 563, where owner of nearly all stock contracted on behalf of corporation.

4. *San Diego Gas Co. v. Frame*, 137 Cal. 441, 70 Pac. 295.

5. *Erkenbrecher v. Grant*, 62 Cal. Dec. 302; *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 181 Pac. 780.

6. *Erkenbrecher v. Grant*, 62 Cal. Dec. 302. See 8 Cal. Law Rev. 435, discussing the decision of the district court of appeal in *Talcott Land Co. v. Hirshiser*, 30 Cal. App. Dec. 586, reversing judgment of the superior court, where it was said in speaking of the tendency in the courts to disregard the corporate entity or “pierce the corporate shield,” that “the principal manifestations of this tendency occur in

But where the third party dealing with the corporation is not a stranger to the facts but has knowledge of the relation of the sole or dominating owner to the corporation, the rule disregarding the corporate entity will not be applied.⁷

§ 13. "One-man" Corporations.— Although in most jurisdictions the fact that one person owns all of the stock of a corporation does not destroy the corporate entity,⁸ nevertheless in California it has been said that on a proper showing that a corporation is but the instrumentality through which an individual for convenience transacts his

two classes of cases, those of the 'one-man corporation' and those involving fraud. As to the first, the courts very well might have declared that the legislature never intended to allow the benefits of the statute relating to corporations to be had when one man owns all or substantially all its capital stock. . . . In the second class of cases, judges, desirous of finding fraud in order to give relief, often have been unwilling to take the trouble to hunt it down in the corporate person, but since some individual was clearly guilty, contented themselves with his guilt." On hearing of this case in the supreme court after judgment in the district court of appeal, it was held that the conclusion reached by the court of appeals that there was a change in the corporate identity was not tenable, and the judgment of the superior court was affirmed.

In *Minife v. Rowley*, 62 Cal. Dec. 611; 102 Pac. 673, after hearing in district court of appeal, in 34 Cal. App. Dec. 763, the supreme court, through Lennon, J. thus stated the

rule: "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person, and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. . . . It is not necessary that the complaint allege actual fraud; it is sufficient if the facts set forth disclose that the dealings were in form with a corporation but in reality with an individual and that a refusal to recognize this fact will bring about inequitable results."

7. *Lynch v. McDonald*, 155 Cal. 704, 102 Pac. 918. See *infra*, § 13, as to "one-man" corporations.

8. See 7 *Buling Case Law*, p. 26.

business, not only equity looking through form to substance, but the law itself will hold such corporation bound as the owner of the corporation might be bound, or conversely, hold the owner bound by acts which bind his corporation.⁹ So, proof that an individual owns all the stock and that the corporation is but the corporate double of the owner destroys the separate identity of the corporation.¹⁰ But the mere fact that one is president and owns the greater portion of the stock is not sufficient to accomplish an estoppel of the corporation by virtue of his knowledge and conduct,¹¹ in the absence of evidence of fraud or dishonesty.¹² The evidence must, however, be

9. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Commercial Security Co. v. Modesto Drug Co.*, 29 Cal. App. Dec. 763. But see *supra*, § 12, to the effect that something of fraud must appear to justify a departure from the general rule as to corporate identity.

10. *Minife v. Rowley*, 62 Cal. Dec. 611, 202 Pac. 673 (where the allegation is that an individual is the owner and holder of all the subscribed, issued and outstanding capital stock of the corporation excepting only a sufficient number of shares necessary to qualify other persons to act as directors; that he at all times controlled the board of directors; that he at all times was the representative of and the only person interested in said corporation; the allegations in substance and effect aver that the corporation is but the double or "alter ego" of the individual, that is, they allege facts showing the virtual identity of the two defendants). *Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220; *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628 (holding that where the owner of a corporation sold its ab-

stract business with the goodwill, that he could be enjoined from engaging in the business, although at the time of the sale all the personal property with which the business was carried on was owned by the corporation); *Deming v. Maas*, 18 Cal. App. 330, 123 Pac. 204; *Rutz v. Obear*, 15 Cal. App. 435, 115 Pac. 67; *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067 (holding that a sale of property of an estate to the appraiser of the estate through the interposition of a corporation which he controls is virtually a sale to the appraiser and therefore voidable). See *Raisch v. Warren*, 18 Cal. App. 655, 124 Pac. 95, where it was alleged and contended that the corporation was but an instrumentality of an individual.

11. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986.

12. *Erkenbrecher v. Grant*, 62 Cal. Dec. 302 (stating that all cases in this state are in accord with this doctrine and citing *Kelly v. Ning Yung Benev. Assn.*, 2 Cal. App. 460, 84 Pac. 321; *Chater v. San Francisco Sugar etc. Co.*, 19 Cal. 219; *Shorb v. Beaudry*, 56

sufficient to establish the unity of interest and ownership,¹³ and the corporation must be treated as a separate entity until it is proven that such person is the sole owner of the corporate stock,¹⁴ or owns practically all of the stock.¹⁵

§ 14. Status of Owner of "One-man" Corporation.—

It is a rule that one who is owner of all the stock of a corporation has power to make conveyance of the property of the corporation, and only such creditors can complain as were creditors of the corporation at the time of the transaction of which complaint is made.¹⁶ In the matter of consideration, as well as of corporate power, the court will look through mere form to reality. Thus, the sole owner of the corporation may sell it to another person and may take the note of the corporation, which will in such case be based on valid consideration.¹⁷ The law is not, it has been said, scrupulously particular in discriminating between the contracts of one who practically owns all the stock of the corporation and controls its

Cal. 446; *Deming v. Maas*, 18 Cal. App. 330, 123 Pac. 204; *Rutz v. Obeare*, 15 Cal. App. 435, 115 Pac. 87; and *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986, as being in harmony with this rule governing the rejection of corporate entity). See preceding section as to necessity of fraud.

13. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494 (holding that where half the stock was held in an estate to which the owner of the other half was sole heir, the property being left subject to administration and payment of debts, such stock was not so owned as to show that such person was owner of all the stock and the only person interested in the corporation).

14. *Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220.

15. *Swartz v. Burr*, 30 Cal. App. Dec. 102, 185 Pac. 411. See article, 4 Cal. Law Rev. 465, on "Limitations of the Theory of a Corporate Entity in California."

16. *Scales v. Holje*, 41 Cal. App. 733, 183 Pac. 308; *Ginaca v. Peterson*, 262 Fed. 904 (stating the rule and citing thereto, Cal. Civ. Code, § 400; *Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Deming v. Maas*, 18 Cal. App. 330, 123 Pac. 204; *Beed & Co. v. Harshall*, 12 Cal. App. 697, 108 Pac. 719). And see cases cited *infra*.

17. *Sargent v. Palace Cafe Co.*, 175 Cal. 737, 167 Pac. 146.

affairs, whether he executes a contract relating to corporate business in his individual or in his corporate capacity.¹⁸ So, where one who owned or controlled all the stock sold out to another reserving the right to prosecute for his own benefit any suits to which the corporation was then a party, the interest of the corporation thereby passed to the vendor of the stock and he could have continued the suits in his own name or in the name of the corporation.¹⁹ The admissions of the sole owner may be received as establishing facts upon which an estoppel might arise against the corporation;²⁰ and he will be estopped to deny the validity of an instrument which he has represented to be regularly executed by the corporation.¹ The fact that the act has not been accomplished in accordance with the corporate by-laws in such cases becomes immaterial.²

§ 15. Corporation as Instrumentality of Partnership.—

Where a corporation is but the instrumentality or convenient medium for the transaction of the business of associates, equity will look through form to substance, and if the transaction between the associates themselves is fair, then corporate irregularities will be disregarded,³ or,

18. *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563 (where the owner of nearly all the stock made, while the corporation was dormant, an agreement for preservation of corporate property); *Schuyler v. Pantages*, 36 Cal. App. Dec. 5, 201 Pac. 137 (holding that the signature of one who is doing business under the name and style of a corporation is sufficient to bind the corporation); *Swartz v. Burr*, 30 Cal. App. Dec. 102, 185 Pac. 411 (where it was represented that the defendant was the corporation and ran its affairs largely in his own discretion).

19. *Harlan Douglas Co. v. Moncur*, 19 Cal. App. 177, 124 Pac. 1053.

20. *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740 (holding that knowledge of the sole owner will be imputed to the corporation); *Rutz v. Obeir*, 15 Cal. App. 435, 115 Pac. 67.

1. *Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220. See *Bell v. Blessing*, 225 Fed. 750, 141 C. C. A. 34 (where the owner of practically all the stock recorded his assent to a transfer of the entire business and property at a directors' meeting, but not as a stockholder, and where it was held to be immaterial so long as he assented).

2. *Commercial Security Co. v. Modesto Drug Co.*, 29 Cal. App. Dec. 763.

3. *Wise Realty Co. v. Stewart*,

indeed, equity may compel the corporation so to reform the transaction as to give it legal validity commensurate with its equitable validity.⁴ So, where a corporate form is but a convenient agency for handling a business, the agreement of partners is valid and binding, although not in accordance with the by-laws;⁵ and such partnership relation may be taken into consideration in determining whether there has been a ratification of corporate acts.⁶ The relation of the corporation to the partners will be held to be substantially, if not technically, that of a trustee,⁷ and the capital stock will be treated as partnership assets.⁸ A purchaser of stock, however, does not become a partner with his fellow stockholders.⁹

169 Cal. 176, 146 Pac. 534; *Hunt v. Davis*, 135 Cal. 31, 66 Pac. 957; *Cornell v. Corbin*, 64 Cal. 197, 30 Pac. 629; *Shorb v. Beaudry*, 56 Cal. 446; *Chater v. San Francisco Sugar Refining Co.*, 19 Cal. 219. See *Eshleman v. Henrietta Vineyard Co.*, 102 Cal. 199, 36 Pac. 579, where corporation was mere instrumentality of joint owners of property. See *Tower v. Wilson*, 30 Cal. App. Dec. 965, 188 Pac. 87, stating that the cases merely go to the point of holding that, as between the original incorporators, the corporation is a trustee, and the court will dispose of its assets in accordance with the original agreement made between them, they, to that extent, some of the cases holding, being regarded as partners in the concern. See *Williamson v. Marshall*, 35 Cal. App. Dec. 875, 200 Pac. 1058, where it was said that the defendants were in fact the corporation and considered as though their agreement was that of the corporation.

4. *Wise Realty Co. v. Stewart*, 169 Cal. 176, 146 Pac. 534.

5. *Behlow v. Fischer*, 102 Cal.

208, 36 Pac. 509 (holding that so long as the original partners are the only ones interested in the corporation, it is to be managed in accordance with their agreement for its organization); *Hyman v. Karl Stern Co.*, 32 Cal. App. Dec. 314, 191 Pac. 47.

6. *Riley v. Loma Vista Ranch Co.*, 1 Cal. App. 488, 82 Pac. 686.

7. *Hunt v. Davis*, 135 Cal. 31, 66 Pac. 957; *Clute v. Loveland*, 68 Cal. 254, 9 Pac. 133; *Shorb v. Beaudry*, 56 Cal. 446.

8. *Hunt v. Davis*, 135 Cal. 31, 66 Pac. 957; *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509; *Shorb v. Beaudry*, 56 Cal. 446. See *Williamson v. Marshall*, 35 Cal. App. Dec. 875, 200 Pac. 1058, where defendants who formed corporation as convenient method of taking over property and affairs of a partnership and made agreement to repurchase stock were held liable to the same rules of accountability as though the corporation itself were the defendant.

9. *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509.

Ordinarily no receiver may be appointed for a corporation;¹⁰ where, however, a corporation is a mere agent for a partnership, on a dissolution of the partnership a receiver may be appointed to take charge of the assets as partnership assets.¹¹ Where the corporation is a mere agency for the partnership, the latter may sue on contracts of the corporation;¹² and an association will be liable for services rendered at its instance or request in connection with the auxiliary corporation.¹³

§ 16. Reincorporation in General.—A corporation cannot evade its just debts or avoid the obligations of its contracts or its tortious conduct merely by changing its name and assuming the outward form of a new corporation.¹⁴ In such case a transfer of the assets from the old to the new corporation will be considered under the familiar principle of law applicable to fraudulent conveyances as having been done to hinder, delay and defraud the creditors of the old corporation. Hence, the assets and property conveyed may rightfully be subjected to the payment of debts of the old corporation,¹⁵ without making the former corporation a party defendant.¹⁶ The cases where one corporation is a continuation of another go upon the ground either that the transaction was one which

10. See *infra*, § 670.

11. *Fischer v. Superior Court*, 98 Cal. 67, 32 Pac. 875. See *Loftus v. Fischer*, 117 Cal. 128, 48 Pac. 1030 (receivership must be dissolved where the corporation is found not to be such agent).

12. *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978.

13. *Kelly v. Ning Yung Benev. Assn.*, 2 Cal. App. 460, 84 Pac. 321 (cemetery corporation as agency of benevolent association).

14. *Koch v. Speedwell Motor Car Co.*, 24 Cal. App. 123, 140 Pac. 598, 600. And see cases cited *infra*.

15. *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 181 Pac. 780; *Atkinson v. Western Dev. Syndicate*, 170 Cal. 503, 150 Pac. 360; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; *Strahm v. Fraser*, 32 Cal. App. 447, 163 Pac. 680; *Koch v. Speedwell Motor Car Co.*, 24 Cal. App. 123, 140 Pac. 598, 600.

16. *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 181 Pac. 780; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

violated the statutory rule prohibiting the division among stockholders of the capital stock,¹⁷ or that the transfer was a fraudulent pretense, leaving the real and beneficial ownership of the property where it had always been.¹⁸ Nominally the two corporations may be different, but as viewed in equity they are the same.¹⁹ To the trial court is given the duty of determining the question of alleged fraud as a matter of fact.²⁰ But fraud does not necessarily inhere in the transaction from the fact that the sole stockholder in each corporation is the same and that such stockholder furnished the consideration.¹ Where there is no consideration for the transfer, it is not necessary to find actual fraud, for such transaction as against the holder of an existing obligation is constructively fraudulent as a matter of law.²

§ 17. Reincorporation to Evade Statute.—Where a corporation is organized in another state merely as an agency of a California corporation, and for the purpose of bringing and prosecuting a suit in the courts of the United States upon the ground of diversity of citizenship, the corporate entity of the new corporation will be disregarded and the suit dismissed.³ The fact that the intention was that all the property of the California corporation should be transferred and the corporation dissolved is not mate-

17. See *infra*, § 512 et seq.

18. *Atkinson v. Western Dev. Syndicate*, 170 Cal. 503, 150 Pac. 360. And see cases cited *supra*. And see FRAUDULENT CONVEYANCES.

19. *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

20. *Manning v. App Consol. Gold Mining Co.*, 171 Cal. 610, 154 Pac. 301, holding a promise to pay the grantor's indebtedness to be a valuable consideration for the transfer; *Atkinson v. Western Dev. Syndicate*, 170 Cal. 503, 150 Pac. 360.

1. *Manning v. App Consol. Gold Mining Co.*, 171 Cal. 610, 154 Pac. 301.

2. *Higgins v. California Petroleum etc. Co.*, 147 Cal. 363, 81 Pac. 1070; *Higgins v. California Petroleum etc. Co.*, 122 Cal. 373, 55 Pac. 155.

3. *Miller & Lux v. East Side Canal etc. Co.*, 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111, see, also, *Rose's U. S. Notes; Phoenix-Buttes Gold Min. Co. v. Winstead*, 226 Fed. 855.

rial where not in fact accomplished.⁴ But the fact that the purpose of the domestic corporation in transferring its property to the foreign corporation is that certain threatened litigation may be conducted in the federal courts rather than in the state courts will not make such transfer voidable, for it is neither essentially fraudulent nor improper.⁵

§ 18. Evidence of Identity.—The mere fact that separately created and existing corporations bear the same name and deal in the same commodities does not suffice, even if the officers and stockholders of each corporation be the same, to create a merger of corporate capacity, identity and liability.⁶ It has been pointed out that the law does not prohibit persons from being interested in different corporations even though their holdings in such corporations be substantially identical; nor does it prohibit a transfer of property from one of such corporations to the other.⁷ But the substantial identity of two corporations may be evidenced by the fact that they occupy the same premises, use the same furniture and that the new corporation publicly displays the name of the old at the original

4. *Miller & Lux v. East Side Canal etc. Co.*, 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111, stating that if before the suit were brought the California corporation had ceased to exist, a different case would be presented.

5. *Manning v. App Consol. Gold Min. Co.*, 171 Cal. 610, 154 Pac. 301.

6. *Koch v. Speedwell Motor Car Co.*, 24 Cal. App. 123, 140 Pac. 598, 600. See *Beck v. Pasadena Lake etc. Co.*, 130 Cal. 50, 62 Pac. 219 (holding that where a mutual water company had been disincorporated and its works fallen into disrepair, and a new company was formed

which repaired and improved the old works at great expense, one who was a member of the old company could not claim the same rights in the new corporation as in the old).

7. *Atkinson v. Western Dev. Syndicate*, 170 Cal. 503, 150 Pac. 360. See *Churchill v. More*, 4 Cal. App. 219, 88 Pac. 290, where it was held that the testimony of a witness that a corporation has been absorbed and merged in another could not be disregarded where there was nothing to justify the conclusion that his knowledge was hearsay only.

place of business.⁸ And if an old corporation is reorganized under a new name, but with practically the same stockholders and directors and continues to carry on the same business, equity will regard the new corporation as a mere continuation of the old,⁹ particularly if the property of the old corporation has been transferred to the new one without consideration as part of a scheme to defraud creditors or evade obligations.¹⁰

§ 19. Extent of Liability of New Corporation.—The new corporation in the case of a reincorporation will be held liable for the indebtedness of the old corporation at least to the extent of the value of the property received from the latter without consideration and under the fraudulent circumstances.¹¹ The extent of the property thus acquired is, however, a matter peculiarly within the knowledge of the reincorporated company, and if it is claimed that a new stockholder had invested money, the extent of the property transferred from the old corporation must be shown in the defense.¹² By statute, of course, a corporation might be required to pay the debts of its predecessor without regard to the sufficiency of the funds received

8. *Strahm v. Fraser*, 32 Cal. App. 447, 163 Pac. 680.

9. *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 181 Pac. 780. See *McCann v. Children's Home Society*, 176 Cal. 359, 168 Pac. 355, where a de facto corporation has been reincorporated under the same name to correct the defects in its organization; *Coos Bay Mfg. Co. v. California Selling Co.*, 29 Cal. App. 407, 155 Pac. 817, where the new corporation organized by persons interested in old continued the business and accepted and disposed of goods ordered by old corporation, it was

held that a judgment against the new corporation was warranted.

10. *Higgins v. California Petroleum etc. Co.*, 147 Cal. 363, 81 Pac. 1070; *Higgins v. California Petroleum etc. Co.*, 122 Cal. 373, 55 Pac. 155; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765. See FRAUDULENT CONVEYANCES.

11. *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Cal. 765; *Strahm v. Fraser*, 32 Cal. App. 447, 163 Pac. 680.

12. *Strahm v. Fraser*, 32 Cal. App. 447, 163 Pac. 680.

from the old corporation.¹³ In the absence of statutory regulation, however, the mere purchase by one corporation of the property of another is not different in law from a similar contract between two individuals. In neither case is the vendee liable for the contractual obligations of the vendor, unless indeed such liability is voluntarily assumed by the former; the mere fact of a purchase of assets does not make the purchasing corporation liable for obligations of the vendor.¹⁴

§ 20. Corporation Continuing Business of Partnership or Individual.—A corporation formed by members of a partnership firm, which took over the business of the partnership and continued its business, paying the debts and conducting it as before, has been held to be estopped to set up a defense founded on the change from partnership to a corporation as against one who continued to deal with the members as before and without any notification that what was formerly a partnership had become a corporation with substantially the same name.¹⁵ And a transfer of the business to a corporation, unaccompanied by a change of possession, is void as to all the creditors of the partnership who are not notified of the transfer.¹⁶ So, also, in the case of an individual, where the corporation

13. *Johnson v. Board of Trustees of State Marine Hospital*, 2 Cal. 319.

14. *Globe Oil Mills v. Van Camp Sea Food Co.*, 35 Cal. App. Dec. 250, 199 Pac. 864.

15. *Reid v. F. W. Kreling's Sons' Co.*, 125 Cal. 117, 57 Pac. 773. See *Gnarini v. Banca Svizzera Americana*, 39 Cal. App. 200, 178 Pac. 532, where a partnership had given a mortgage to secure an indebtedness and the partnership was formed into a corporation composed exclusively of members of the partnership, it was held that

the mortgage secured a new note given by the corporation in renewal of partnership note, the note being executed in the same way as the former note. And *Gnarini v. Swiss-American Bank*, 162 Cal. 181, 121 Pac. 726, under the same state of facts, the incorporation of the partnership being a mere matter of convenience, but the court not deciding whether the partnership and corporation were to be regarded as separate entities.

16. *White v. Kincaid*, 180 Cal. 135, 179 Pac. 685.

continues to do his business at the same place and in the same manner, there is no such change of possession as will make the transfer valid against creditors of the vendor.¹⁷ However, a partnership formed by the members of a corporation may be a separate entity from the corporation, although it carry on the same kind of business upon the premises formerly occupied by the corporation.¹⁸

Classification.

§ 21. **In General.**—While there is no provision of the code expressly classifying corporations, it is to be observed that the legislature has practically classified them. Some twenty-two different classes of corporations are provided for, as to which there is specific legislation, each being treated under a separate title; and the fact that they are so treated would seem conclusive of the intention of the legislature to regard them as different and distinct.¹⁹ All corporations of one class must be organized in the same manner, but the nature of the organization does not permit, nor does the constitution require, that corporations of different classes shall be organized in the

17. *McKee Stair Bldg. Co. v. Martin*, 126 Cal. 557, 58 Pac. 1044. See FRAUDULENT CONVEYANCES.

18. *Triest & Co. v. Goldstone*, 173 Cal. 240, 159 Pac. 715 (where a corporation divided its property among its stockholders, who formed two partnerships and with the consent of the lessor each took a portion of the premises, it was held that there was a surrender of the lease by the reletting of the premises, hence the corporation was not liable for rent). See note discussing this case in 4 Cal. Law Rev. 158. See *Stimson Mill Co. v. Hughes Mfg. Co.*, 8 Cal. App. 559, 97 Pac. 322, where an account rendered to a

partnership was held not to bind a succeeding corporation as an account stated.

19. *Huntington v. Curry*, 14 Cal. App. 468, 112 Pac. 583 (holding that street railroads were treated as separate and distinct from other railroads). The number of different classes of corporations is now probably in excess of twenty-two by reason of amendments to the code and by reason of statutory provisions outside of the codes. See § 1, *supra*, for cross-references to articles dealing with various classes of corporations. See, also, *infra*, §§ 24 and 25.

same manner nor provided with the same powers. Hence, the provisions for the organization and powers of railroad insurance, religious, mining and other business corporations have been adapted to their respective characters and needs.²⁰

In general, the natural or intrinsic quality which forms the basis of classification is one for determination by the legislature, and the courts are not disposed to go afield in search of possible reasons for setting aside legislative acts on the subject as special legislation.¹ And if the legislature has seen fit to require one class of corporations, in order to become such, to do things not required of other classes, it is not for the courts to prescribe other requirements.² The question whether a corporation can be formed under more than one of the statutes, or be clothed with the powers and franchises conferred upon two or more of the separate classes such as may be created under different laws, has not been decided, but it has been said to be certain that such corporation cannot escape the performance of a public duty which it assumes on its attempted incorporation as of one class by the assertion of a right under another.³

The character of the corporation is to be determined not alone by the powers of the corporation as defined in its charter, but also by the manner in which it conducts its business.^{3a}

§ 22. Corporations Aggregate and Sole.—A classification which has been long recognized is the division into

20. *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675.

1. *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30; *Krause v. Durbrow*, 127 Cal. 681, 60 Pac. 438.

2. *Huntington v. Curry*, 14 Cal. App. 468, 112 Pac. 583.

3. *Price v. Riverside Land etc. Co.*, 56 Cal. 431.

3a. *Stewart v. California Medical etc. Association*, 178 Cal. 418, 176 Pac. 46; *Del Mar Water etc. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948.

corporations aggregate and corporations sole.⁴ A corporation aggregate is composed of more than one person, and in California it must be composed of at least three persons.⁵ A corporation sole is a corporation composed of but one member, as the bishop of a church. Such a corporation can be created in California only by compliance with the provisions of section 602 of the Civil Code.⁶ The power to sue is an inseparable incident to a corporation sole;⁷ and the code provides that it shall have continued succession and continued existence during the term for which it is organized to exist, notwithstanding vacancies in the incumbency thereof.⁸

“A bishop or parson acting in a corporate capacity and holding property to him and his successor in right of his office has no need of a corporate name; he requires no peculiar seal; he performs all legal acts under his own seal, in his own name and name of office; his own will alone regulates his acts, and he has no occasion for a secretary, for he need not keep a record of his acts; no need of a treasurer, for he has no personal property, except the rents and proceeds of the corporate estate, and these he takes to his own use when received. By-laws are unnecessary; for he regulates his own action by his own will and judgment, like any other individual acting in his own right. Where property vests in a bishop, parson or other sole corporation, he holds it to his own name and benefit whilst he holds the office, and afterward the estate, and the enjoyment of it, go together to his successor when established. The transmission of the estate is perpetual, but the beneficial enjoyment changes at each succession.”⁹

4. *Roman Catholic Archbishop v. Shipman*, 79 Cal. 288, 21 Pac. 830.

5. Civ. Code, § 285.

6. *Blakeslee v. Hall*, 94 Cal. 159, 29 Pac. 623. See *Mora v. Murphy*, 83 Cal. 12, 23 Pac. 63 (as to filing articles). See RELIGIOUS SOCIETIES.

7. *Santillan v. Moses*, 1 Cal. 92 (where it was held that the position of a priest holding mission land was analogous to that of a

sole corporation, and that he might in his character as priest under the laws applicable at the time maintain an action in his own name to recover possession of mission lands reserved for religious purposes). See *Mora v. Le Roy*, 58 Cal. 8 (pleading corporate capacity).

8. See Civ. Code, § 602a.

9. *Roman Catholic Archbishop v. Shipman*, 79 Cal. 288, 21 Pac. 830.

§ 23. Public, Private and Quasi-public Corporations.

"Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the state; all other corporations are private."¹⁰

Public corporations, under the controlling definition of the law, are those formed for political and governmental purposes and vested with political and governmental powers.¹¹ If the object is the government of a portion of the state, even though it involves some private interests, yet being endowed with a portion of political power, the term public has been deemed appropriate. Such corporations are auxiliaries of the government in the important business of municipal rule,¹² and their leading object is to promote the public interest.¹³ Although a municipal corporation has delegated to it certain powers of government, it is only in reference to its delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as effect its ownership of property in buying, selling or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person.¹⁴

There is another class of corporations, called, for convenience of description, quasi-public corporations.¹⁵ These are technically private, but having in view some great public enterprise in which the public interests are directly involved are deemed to be of a quasi-public character. Of this class are corporations such as railroad, turnpike and canal companies.¹⁶ It has been decided, however, that a corporation organized to engage in public service does not

10. Civ. Code, § 284.

11. *Bettencourt v. Industrial Acc. Com.*, 175 Cal. 559, 166 Pac. 323. See *infra*, § 25, as to counties, school districts, etc. See COUNTIES; MUNICIPAL CORPORATIONS.

12. *Dean v. Davis*, 51 Cal. 406.

13. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

14. *Touchard v. Touchard*, 5 Cal.

306. See MUNICIPAL CORPORATIONS.

15. *Bettencourt v. Industrial Acc. Com.*, 175 Cal. 559, 166 Pac. 323.

16. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

See references, *supra*, § 1, to corporations of quasi-public character.

by the mere filing of its articles become entitled to be treated as a public service corporation.¹⁷

§ 24. Irrigation, Reclamation or Levee Districts.—An irrigation district is a public corporation,¹⁸ or a quasi-public corporation,¹⁹ organized under a general law enacted for the purpose of promoting the general welfare;²⁰ and its officers are considered public officers.¹ Certain of the decisions have held reclamation and levee districts to be public corporations,² or quasi-public corporations,³ for municipal purposes,⁴ yet they are sometimes denominated quasi corporations because they do not possess all the powers belonging to corporations or those usually pos-

17. *Del Mar Water etc. Co. v. Fehleman*, 167 Cal. 666, 140 Pac. 591, 948; *Transcontinental Tel. Co. v. Neylan*, 34 Cal. App. 379, 167 Pac. 541.

18. *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56, see also, *Rose's U. S. Notes* (case arising in California); *Perry v. Otay Irr. Dist.*, 127 Cal. 565, 60 Pac. 40; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514; *People v. Selma Irr. Dist.*, 98 Cal. 206, 32 Pac. 1047; *People v. Turnbull*, 93 Cal. 630, 29 Pac. 224; *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. E. A. 755, 28 Pac. 272, 675; *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. 797; *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. 825; *Reclamation District No. 765 v. McPhee*, 13 Cal. App. 382, 109 Pac. 1106. See **WATERS.**

19. *Turlock Irr. Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379.

20. *Perry v. Otay Irr. Dist.*, 127 Cal. 565, 60 Pac. 40; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514, 777; *People v. Selma Irr. Dist.*, 98

Cal. 206, 32 Pac. 1047; *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. E. A. 755, 28 Pac. 272, 675; *Turlock Irr. Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379.

1. *Perry v. Otay Irr. Dist.*, 127 Cal. 565, 60 Pac. 40; *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. E. A. 755, 28 Pac. 272, 675.

2. *Angus v. Browning*, 130 Cal. 502, 62 Pac. 827; *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866; *Reclamation District No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779; *People v. La Rue*, 67 Cal. 526, 8 Pac. 84; *Hoke v. Perdue*, 62 Cal. 545; *People v. Williams*, 56 Cal. 647; *People v. Reclamation District No. 108*, 53 Cal. 346; *Dean v. Davis*, 51 Cal. 406. See **WATERS.**

3. *Reclamation District No. 542 v. Turner*, 104 Cal. 334, 37 Pac. 1038.

4. *Swamp Land District No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866; *People v. Reclamation District No. 108*, 53 Cal. 346.

essed by municipal corporations.⁵ They are distinctly not private corporations;⁶ neither are they corporations for municipal purposes within the meaning of the constitution,⁷ and hence it has been held that they do not belong to either of the classes defined in section 284 of the Civil Code.⁸ It is more accurate to say that they are not corporations at all, but are public agencies or governmental mandatories vested with limited powers to accomplish a limited and specific work.⁹

§ 25. Counties—School Districts—Miscellaneous.—The people of a county are not a corporation, although the county itself is a corporation¹⁰ or quasi corporation.¹¹ A school district is a corporation organized for educational purposes,¹² and is classified with a county as a necessary political division of the county. It is a public and not a municipal corporation.¹³ Sanitary districts are public

5. *Hensley v. Reclamation District No. 556*, 121 Cal. 96, 53 Pac. 401; *People v. Reclamation District No. 551*, 117 Cal. 114, 48 Pac. 1016; *People v. Reclamation District No. 108*, 53 Cal. 346.

6. *People v. Levee District No. 6*, 131 Cal. 30, 63 Pac. 676.

7. *People v. Levee District No. 6*, 131 Cal. 30, 63 Pac. 676. See MUNICIPAL CORPORATIONS.

8. *People v. Reclamation District No. 551*, 117 Cal. 114, 48 Pac. 1016; *Reclamation District No. 70 v. Sherman*, 11 Cal. App. 399, 105 Pac. 277.

9. *Bettencourt v. Industrial Acc. Com.*, 175 Cal. 559, 166 Pac. 323; *Reclamation District No. 70 v. Birks*, 159 Cal. 233, 113 Pac. 170; *People v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207; *San Francisco Sav. Union v. Reclamation Dist. No. 124*, 144 Cal. 639, 79 Pac. 374; *Reclamation District No. 551 v. County of Sacra-*

mento, 134 Cal. 477, 66 Pac. 668; *People v. Levee District No. 6*, 131 Cal. 30, 63 Pac. 676; *Hensley v. Reclamation District No. 556*, 121 Cal. 96, 53 Pac. 401; *People v. Reclamation District No. 551*, 117 Cal. 114, 48 Pac. 1016; *Reclamation District No. 70 v. Sherman*, 11 Cal. App. 399, 105 Pac. 277. See WATERS.

10. *People v. Myers*, 15 Cal. 33. See *Hunsaker v. Borden*, 5 Cal. 288, where it is said that a county is not a person in any sense; it is not a corporation; it cannot sue or be sued except where specially permitted by statute.

11. *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Price v. County of Sacramento*, 6 Cal. 254. See COUNTIES.

12. *Hamilton v. County of San Diego*, 108 Cal. 273, 41 Pac. 305.

13. *Dean v. Davis*, 51 Cal. 406; *People v. Rinner*, 35 Cal. App. Dec. 266, 199 Pac. 1066 (although per-

corporations, but not municipal corporations.¹⁴ Road districts, however, are not corporations at all, since there is no requirement that they should do any corporate acts.¹⁵ So, also, it has been held that a protection district is not a public corporation, but is a governmental agency.¹⁶ Agricultural associations organized under state law have been held to be public agencies charged with the performance of a part of the functions of state government, and to be public corporations.¹⁷

§ 26. Homestead Corporations.—Corporations may be organized for the purpose of acquiring lands in large tracts, paying off encumbrances thereon, improving and subdividing them into homestead lot or parcels and distributing them among the shareholders. These are known as homestead corporations, and it is provided that their corporate existence cannot exceed a period of ten years.¹⁸ At the expiration of such period, the corporation must terminate, except for the winding up and settlement of its affairs.¹⁹ It may be terminated by dissolution or forfeiture adjudged by the court for violation of the provision of law against such corporations purchasing, selling, or otherwise acquiring and disposing of real property or any interest therein or any personal property, for the sole pur-

haps of a quasi-municipal character); *Wood v. County of Calaveras*, 164 Cal. 398, 129 Pac. 283; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067. See SCHOOLS.

14. *In re Werner*, 129 Cal. 567, 62 Pac. 97. See HEALTH.

15. *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809. See *Dean v. Davis*, 51 Cal. 406, to effect that road districts may be and often are public corporations. See HIGHWAYS.

16. *Pasadena Park Imp. Co. v. Leland*, 175 Cal. 511, 166 Pac. 341;

Harpham v. Board of Supervisors, 41 Cal. App. 192, 182 Pac. 324.

17. *Sixth Dist. Agr. Assn. v. Wright*, 154 Cal. 119, 97 Pac. 144; *People v. San Joaquin Valley Agr. Assn.*, 151 Cal. 797, 91 Pac. 740; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416. See ASSOCIATIONS, vol. 3, p. 345.

18. Civ. Code, § 557; and generally, as to such corporations, see Civ. Code, §§ 557-566. And *Stats.* 1873-74, p. 525, providing for the extension of period of existence of homestead corporations.

19. Civ. Code, § 563.

pose of speculation or profit, or for violation of the prohibition against such corporation at any one time owning or holding, in trust or otherwise, for its purposes, real property or any interest therein which in the aggregate exceeds in cash value the sum of two hundred thousand dollars.²⁰ The by-laws of such corporations must specify the times when the installments of capital stock are payable, the amount thereof and the fines, penalties or forfeitures incurred in case of default. When such shares are declared forfeited, they may be sold by the corporation at auction.¹

§ 27. Industrial Loan Companies.—A corporation known as an industrial loan company is one which, in the regular course of business, loans money and issues its own choses in action as provided by an act of the legislature of 1917.² The statute regulates the amount and par value of shares of the capital stock of such companies, as well as the manner of payment therefor. Industrial loan companies are given power to loan money on personal security, or otherwise, and to deduct interest therefor in advance at the rate of six per cent per annum or less, and in addition to require uniform weekly or monthly installments on their certificates of investment purchased by the borrower simultaneously with the loan transaction or otherwise and pledged with the corporation as security for the loan. But such corporations are forbidden to receive deposits or issue certificates of deposit. Such companies may also charge two dollars for every fifty dollars or fraction thereof loaned, for expenses. Such companies are limited by the act as to loans and investments, and the general conduct of such corporations is placed under the supervision of the commissioner of corporations, who is given power to order the discontinuance of violations of the law or of unsafe practices; and upon failure of the company to comply with the order, the commissioner is

20. Civ. Code, § 562.

2. Stats. 1917, p. 658.

1. Civ. Code, §§ 558, 559.

given power to take possession of the property and business of the company until it resumes business or its affairs are finally liquidated, in the manner provided for the taking possession of and liquidation of banks.³

II. CREATION, ORGANIZATION AND CONSOLIDATION.

By General or Special Act.

§ 28. **In General.**—The act of incorporation, instead of being, as formerly, a favor granted by the sovereign to the subject, has under the American system become a matter of right available under general laws.⁴ Where a corporation is created by special charter or act, in order to complete the creation the charter must be accepted by the persons incorporated. But this rule has no application to a corporation formed under general laws, where the incorporators are the acting parties to its creation.⁵ In California the charter is the statute or statutes granting and defining the powers under which the corporation is constituted and exists,⁶ together with the instruments required to be executed by the provisions of such general laws.⁷ And every new general law affecting corporations necessarily amends the charter to the extent that it operates upon them differently from existing laws.⁸ But the by-

3. Stats. 1917, p. 658. Amended 1921, Stats. 1921, p. 729. See *BANKS*, vol. 4, p. 292 et seq.

4. *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

5. *Spring Valley Water Works v. San Francisco*, 22 Cal. 434.

6. *Spurgeon v. Santa Ana Valley Irr. Co.*, 120 Cal. 71, 39 L. B. A. 701, 52 Pac. 140 (per Temple, J., in concurring opinion); *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Spring Valley Water Works v. Schottler*, 62 Cal. 69. See

Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615, in which Justice McKinstry said that a general law, after the corporation is formed, may not improperly be said to be the charter defining its powers.

7. *Spring Valley Water Works v. Schottler*, 62 Cal. 69.

8. *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341. See *infra*, § 38 et seq. as to effect of amendments of such general laws.

laws of a corporation are no part of the charter;⁹ and the incorporators can make no by-laws which conflict with or displace the general laws.¹⁰

§ 29. Creation Under General Laws.—The constitution provides that "Corporations may be formed under general laws, but shall not be created by special act. . . ." ¹¹ Although the provision requiring that corporations must be formed under general laws, under the declaration of the constitution itself, in article I, section 22, is mandatory rather than permissive, it has never been construed as requiring that all private corporations must be formed under the same general law, or limited to the exercise of the same powers.¹² The general and uniform operation of a statute is not affected by reason of the fact that it authorizes corporations to adopt or reject a particular provision, nor because it gives to all corporations of its kind or class the opportunity of adopting either the one or the other of two different provisions, if neither conflicts with the constitution.¹³ And where an act provides for acceptance by vote of the proposed incorporators, although the corporation is not created until such acceptance, nevertheless this is not unconstitutional as a delegation of legislative power to create a corporation. The proceeding is in fact in direct accord with the principles prohibiting the legislature from creating such corporation.¹⁴ An act which on its face purports to be, and is in fact, a special act cannot be converted into a general act by the declaration of the legislature in another act that it shall be so considered. The

9. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

10. *Spurgeon v. Santa Ana etc. Irr. Co.*, 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140. As to by-laws generally, see *infra*, §§ 113-125.

11. Art. XII, § 1; Const. 1849, art. IV, § 31, contained substantially the same provision.

12. *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675. See *supra*, § 21, as to classification.

13. *Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317.

14. *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675.

special act being void cannot be incorporated into the general law.¹⁵

§ 30. Special Legislation.—Long prior to the adoption of the first California constitution in 1849, experience had demonstrated the evils resulting from special legislation with reference to corporations. It has been judicially noticed that, by means of hasty or corrupt legislation, monopolies had been created, which were beyond legislative control. Capital was aggregated with peculiar and oppressive privileges. There was, in addition, no uniformity in the powers exercised by corporations pursuing the same business. So long as they derived their charters from special legislative grants, these, of course, varied according to the temper of the legislature; and the result was that each succeeding corporation had greater or less powers than its predecessors.¹⁶ The limitation upon the creation of private corporations by special laws closed a prolific source of legislative corruption. It has been said that no good reason exists why the right to be a corporation should not be enjoyed by all who desire and that the framers of the constitution wisely removed the difficulty by requiring that these privileges should be obtained only under general laws, open to all citizens upon equal terms.¹⁷

§ 31. Corporations not Within Prohibition.—While section 1, article XII of the constitution refers to corporations generally,¹⁸ it is stated in section 4 of the same article that “The term corporations, as used in this article shall be construed to include all associations and joint stock companies having any of the powers of privileges of corporations not possessed by individuals or part-

15. *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493. As to special legislation generally, see CONSTITUTIONAL LAW, vol. 5, p. 793. And cases cited *infra*.

16. *San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

17. *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

18. See *supra*, § 29.

nerships." These sections, considered by themselves and in relation to the entire article on corporations, refer to private corporations, and have no relation to corporations, such as hospitals for the insane, which are public corporations under the control of the state, and created and acting merely as state agencies for the protection of society and the betterment of the condition of its citizens.¹⁹ Likewise, levee or reclamation districts are not corporations for municipal purposes within the meaning of the constitution, nor are they private corporations, but are in a class by themselves, hence the constitutional provision does not limit the general powers of the legislature for the creation, organization and control of such districts.²⁰

§ 32. Change of Name as "Creation."—The mere changing of its name is not the creation of a corporation in the sense of the constitutional provision that corporations may be formed under general laws but shall not be created by special act.¹ However, the change of name of a corporation by special act of the legislature has been prevented by other provisions of the constitution prohibiting special legislation changing the names of persons or places.²

§ 33. Recognition by Act of Legislature.—A recognition of the existence of a corporation by act of the legislature is not sufficient proof of its corporate existence, for a corporation cannot be created by legislative recognition, since the constitution prohibits the creation of them other than by general laws.³ It would seem, though, that if the act

19. *Napa State Hospital v. Dasso*, 153 Cal. 698, 15 Ann. Cas. 910, 18 L. R. A. (N. S.) 643, 96 Pac. 355.

20. *People v. Levee District No. 6*, 131 Cal. 30, 63 Pac. 676; *Reclamation District No. 70 v. Sherman*, 11 Cal. App. 399, 105 Pac. 277. See **WATERS**.

1. *Pacific Bank v. De Ro*, 37 Cal. 538.

2. *Matter of La Societe etc.*, 123 Cal. 525, 56 Pac. 458, 787. See *infra*, §§ 87-92.

3. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354.

of the legislature were a general act curing defects in the organization of corporations, it would be valid;⁴ and there is seldom any question raised as to the prospective operation of such a curative statute, for it is just as competent for the legislature to confer additional powers, privileges and immunities by the subsequent as by the original act.⁵ Since corporations other than those within the constitutional prohibition may be created by special act, the creation thereof may be shown by acts recognizing their existence,⁶ and in such case the action is conclusive proof not to be gainsaid that the corporation existed from the time of such recognition.⁷

§ 34. Creation by Implication.—A public corporation can be created not only by the means and in the manner provided by general law, but also by special act, or it may be created by implication of law.⁸ Powers or privileges may be conferred or duties enjoined of such a character that such a corporation would be required, and from which it must be implied;⁹ and in such cases, and to the extent required, a corporation is created by implication. The doctrine of the creation of corporations by implication was developed to save and make effective legislative acts which purport to confer powers which

4. See *Larrabee v. Baldwin*, 35 Cal. 155, where apparently such an act had been passed. See, also, *San Francisco v. Spring Valley Water Works*, 48 Cal. 493, and *California State Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 398, where the rule was discussed under a similar clause in the constitution of New York.

5. *People v. Perrin*, 56 Cal. 345.

6. *People v. Levee District No. 6*, 131 Cal. 30, 63 Pac. 676; *Swamp Land Dist. v. Silver*, 98 Cal. 51, 32 Pac. 866; *Reclamation District No. 124 v. Gray*, 95 Cal. 601, 30

Pac. 779; *People v. Reclamation District No. 108*, 53 Cal. 346. See *supra*, § 31, as to corporations not within the constitutional prohibition; and see *infra*, § 34, as to creation of public corporation by special act or by implication.

7. *Reclamation District No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779.

8. *Reclamation District No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779; *People v. Reclamation District No. 108*, 53 Cal. 346.

9. *People v. Reclamation District No. 108*, 53 Cal. 346.

can only be exercised by a corporation, but where the legislature neglected to specifically grant corporate existence. The doctrine is not to be extended, however, beyond cases where it is necessary to accomplish the legislative intent. Thus, where an agency is not required to do any corporate act it will not be deemed a corporation by implication.¹⁰

§ 35. Incorporation by Grantees of a Franchise.—Where a legislative act attempts to confer upon individuals certain privileges and impose certain duties, but provides also that the individuals must organize themselves in conformity with existing laws regulating corporations,—the legislative grant to take effect when the corporation is formed,—it has been held that this is an attempt to confer on a private corporation privileges and to subject it to duties not common to other corporations formed under the same general law, and, hence, not within the constitutional powers of the legislature.¹¹ But where a franchise is conferred on individuals with no condition as to incorporation, this is not a violation of the constitutional provision, even though the individuals are subsequently incorporated. If any connection between the subsequent incorporation and the passage of the special act can be traced, or if it appear that the act was obtained for the purpose of evading the constitutional inhibition, then the act may be held unconstitutional, but not otherwise.¹²

10. *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809.

11. *San Francisco v. Spring Valley Water Works*, 48 Cal. 493. But see *Spring Valley Water Works v. San Francisco*, 22 Cal. 434, where it was held that the same franchise, said to have been granted under general laws, became vested in the corporation as soon as it was formed.

12. *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075. See *Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597, 25 Pac. 765, where a franchise was granted to several individuals, not to a company, but where the individuals constituted a committee of the subscribers appointed for the purpose of applying for the franchise, which was transferred to the company formed in pursuance of the agreement.

It has been held that the mere intention of the grantees to form a corporation, undisclosed to the granting power, will not invalidate the grant.¹³

§ 36. Assignment of Franchise or Special Privilege.—

Although the legislature is forbidden from creating private corporations by special act,¹⁴ it has been held that there is nothing to prevent a corporation from purchasing or holding franchises which may have been granted to others. The fact that privileges of a like character are sometimes conferred upon corporations does not make the individuals upon whom they are conferred a corporation, and thus invalidate the grant.¹⁵ The provision of the constitution applies to the creation of corporations and to the powers directly conferred upon them by legislative enactment, and cannot be construed as prohibiting the assignment of a franchise to a legally organized corporation by persons having the lawful right to exercise and transfer the same.¹⁶ By acquiring such additional franchises or special privileges, the corporation is not in any sense "formed" or "created," for they are not of the essence of the corporation; nor can it be properly said that it is thereby adding to its "corporate powers."¹⁷

§ 37. Conferring of Special Benefits.—Under the constitutional provisions, private corporations can be formed only under general laws and can exercise no powers except such as are derived from general laws.¹⁸ But it is entirely

13. Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720 (case arising in California).

14. See *supra*, § 30.

15. California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398.

16. San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; People v. Stanford, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693. See Southern Pac. R. Co. v. Orton, 32

Fed. 457, as to granting of franchise directly to corporation. See FRANCHISES.

17. California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398.

18. Spring Valley Water Works v. Bryant, 52 Cal. 132; San Francisco v. Spring Valley Water Works, 48 Cal. 493. And see *supra*, § 29.

competent for the legislature to confer upon an existing corporation and all similar corporations additional powers by a general law.¹⁹ Since, however, it would be a violation of the constitution to create a corporation by special act, it follows that it would be equally unconstitutional to confer special power on a corporation already created. In other words, the legislature cannot do by two acts what it could not do by one.²⁰ Although the language of certain cases is seemingly to the effect that there is nothing in the constitutional provision which either directly or impliedly prohibits the legislature from directly granting to a corporation, already in existence and created under general laws, special privileges in the nature of a franchise by a special act,¹ nevertheless it has been held that any attempt to confer a benefit or impose a duty upon one or

19. *People v. Perrin*, 56 Cal. 345. See *Southern Pac. R. Co. v. Orton*, 32 Fed. 457, holding that a corporation already created might receive a grant and enjoy other distinct and independent franchises such as might be granted to individuals.

Private corporations formed for similar purposes stand upon the same footing, enjoy the same rights and are subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all; *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303; *Waterloo etc. Road Co. v. Cole*, 51 Cal. 381; *San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

The rights and duties of all corporations formed under the general law are fixed and determined by its terms, and can only be changed or modified by amendment of the general law and every such amendment must be made applicable to all corporations created under the

general law; *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303; *San Francisco v. Spring Valley Water Works*, 48 Cal. 493. See *Omnibus R. Co. v. Baldwin*, 57 Cal. 160, *McKinstry, J.*, concurring, and explaining the case of *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

20. *Low v. City of Marysville*, 5 Cal. 214.

Where an act confers power on societies which are said to be existing corporations, but does not confer it on them as corporations, the words "existing corporations" may be considered as descriptive personarum; *Ex parte Fraser*, 54 Cal. 94.

1. *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398 (overruled as to this in *San Francisco v. Spring Valley Water Works*, 48 Cal. 493); *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736, see, also, *Rose's U. S. Notes*).

more corporations formed under a general law, not conferred or imposed upon all corporations formed under the same law, is in conflict with the constitutional provision and void.³

Amendment of the General Laws.

§ 38. In General.—The constitution provides that

“All laws now in force in the state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed.”

And the Civil Code provides in part that

“The legislature may at any time amend or repeal this part, or any title, chapter or section thereof, and dissolve all corporations created thereunder. . . .”²

The rights and duties of all corporations formed under general law are fixed and determined by the terms of that law and can be modified only by amendment of the general law; and every such amendment must be made applicable to all corporations created under the general law.⁴ But it is obvious that whether the right to alter the terms and conditions on which a corporate right is held be provided for in the charter of the corporation or is reserved in a general law under which it is organized, or is reserved in the state constitution, the result must be the same.⁵ The evident purpose of the constitution was to make plain that corporations should have no legal right to insist that any general law should continue in force unchanged because it was in force at the time of its organization.⁶ And

2. *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303. See, also, *San Francisco v. Spring Valley Water Works*, 53 Cal. 608, following *S. C.*, 43 Cal. 493.

3. Const., art. XIII, sec. 1; Civ. Code, § 404.

4. *San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

5. *Morrow v. Superior Court*, 2 Cal. Unrep. 124.

6. *Boca Mill Co. v. Curry*, 154 Cal. 326, 97 Pac. 1117 (in which are considered the proceedings of

the clause, it has been said, was undoubtedly drawn with reference to the prohibition that a state shall not pass a law impairing the obligation of contracts and the judicial decisions under it, notably the *Dartmouth College Case*,⁷ its primary purpose being to retain for the state the power to alter the terms of a grant of corporate rights, and to relieve any such alteration of invalidity as an impairment of the obligations of a contract.⁸ And so, every new general law affecting corporations, necessarily amends charters to the extent that it operates upon them differently from existing laws.⁹

§ 39. Corporate Charter as Contract. — Corporations created by special acts and endowed by their charters with certain rights cannot be deprived of such rights without their consent, for a charter when accepted by the corporators is a contract between them and the state that the powers, privileges and franchises granted shall not be re-

the constitutional convention upon the enactment of the constitutional provision). See *infra*, § 41, as to scope of power to amend under this section of the constitution.

7. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, see, also, *Rose's U. S. Notes*.

The provision was intended to keep corporations within a wholesome legislative control and to repel the assumption that their rights are held under a contract which the legislature is powerless to modify; *San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

8. *Morrow v. Superior Court*, 2 Cal. Unrep. 124. See *infra*, § 39. And see generally as to impairment of obligations of contract, *CONSTITUTIONAL LAW*, vol. 5, p. 763.

9. *Kaiser Land & Fruit Co. v.*

Curry, 155 Cal. 638, 103 Pac. 341; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615 (as to legislation affecting municipal corporations).

Any provision of the Civil Code is subject to a general law necessarily in conflict therewith subsequently passed, whether that law may be placed in one of the codes or in a separate act. It cannot be claimed that such legislation would be, if made applicable to corporations organized prior to its adoption in violation of section 1 of article XXII of the constitution declaring that all laws in force at the adoption of the constitution not inconsistent therewith shall remain in full force or effect until altered or repealed by the legislature; *People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 Pac. 306.

strained, controlled or destroyed without their consent,¹⁰ and as such it is protected by the constitution of the United States which prohibits any state from passing laws impairing the obligations of contracts.¹¹ That must be so unless it has been otherwise provided in the contract itself,¹² in which case the consent given in the contract qualifies the right.¹³ Where the corporation obtains its charter under the provision of the California constitution, however, as part of the state's organic law, the provision enters into the contract and the corporation consents to take it subject to the exercise of the powers reserved to the state.¹⁴ But even where corporations have been chartered by special act, it has been held that such an act is not in the nature of an exclusive grant carrying with it a restriction upon the granting power to make a similar grant to other grantees, though the last grant necessarily interferes with the profits and business of the first.¹⁵

§ 40. Power to Alter Charter.—In California there is no restriction on the power of the legislature to amend a charter, for that power is expressly reserved to the legis-

10. *San Francisco v. Spring Valley Water Works*, 48 Cal. 493; *Morrow v. Superior Court*, 2 Cal. Unrep. 124.

11. *Merchants' Nat. Bank v. Escondido Irr. Dist.*, 144 Cal. 329, 77 Pac. 937 (holding that an act providing for the organization of an irrigation district and organization of the district under the act is a contract between the state and the individuals whose property is thereby affected within meaning of federal constitution concerning the impairment of the obligation of contracts); *San Francisco v. Spring Valley Water Works*, 48 Cal. 493. See, also, *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518,

4 L. Ed. 629, see, also, *Rose's U. S. Notes*, which established this doctrine. See *CONSTITUTIONAL LAW*, vol. 5, p. 759.

12. *Spring Valley Water Works v. San Francisco*, 61 Cal. 3.

13. *Morrow v. Superior Court*, 2 Cal. Unrep. 124.

14. *Spring Valley Water Works v. San Francisco*, 61 Cal. 3.

15. *Indian Canyon Road Co. v. Robinson*, 13 Cal. 519, citing *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. Ed. 773, see, also, *Rose's U. S. Notes*, the case which modified the strict doctrine set forth in the *Dartmouth College Case*. See *BRIDGES*, vol. 4, p. 535; *FERRIES*.

lature by the constitution;¹⁶ and, moreover, the reserved power to alter or repeal the charter of a corporation becomes a part of the contract of every stockholder thereof.¹⁷ In other words, by becoming a stockholder one gives an implied assent to the right of the legislature to alter and amend the law within the scope of the constitutional provision.¹⁸ Thus, a provision requiring a two-thirds vote of all stockholders for dissolution is not a legal right of which stockholders cannot be deprived by subsequent enactment permitting dissolution upon the vote of holders of two-thirds of the subscribed capital stock.¹⁹ So, also, a change in the stockholders' liability is fully authorized by the contract itself.²⁰ Likewise, under this rule, the legislature may change the conditions upon which the privilege of being a corporation shall continue to exist, by prescribing the annual payment of any amount it sees fit as a license tax, for the purpose of increasing public revenue.¹ The constitutional provisions permit the change of general laws not only by a legislature assembled under that constitution, but by a legislative body under a subsequent constitution or by a provision of a new state constitution.²

§ 41. Scope of Reserved Power to Alter.—While those who form a corporation under the general laws passed in accordance with the constitution agree that the state shall retain the right to alter the charter contract,³ the power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good

16. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225. And cases cited *infra*.

17. *Matter of College Hill Land Assn.*, 157 Cal. 596, 108 Pac. 681; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

18. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

19. *Matter of College Hill Land Assn.*, 157 Cal. 596, 108 Pac. 681.

20. *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Morrow v. Superior Court*, 2 Cal. Unrep. 124.

1. *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

2. *Morrow v. Superior Court*, 2 Cal. Unrep. 124. See CONSTITUTIONAL LAW, vol. 5, p. 566.

3. See *supra*, § 40.

faith, and be consistent with the scope and object of the act of incorporation. It has been said that sheer oppression and wrong cannot be inflicted under the guise of amendment. Beyond the sphere of reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases.⁴ The provision of article XII, section 1, of the constitution is qualified by other provisions concerning the impairment of the obligation of contracts, and by the provisions of the United States constitution to the same effect, and also by the fourteenth amendment.⁵ Hence, a corporation may not, while it exists, be deprived of the rights guaranteed by the federal constitution, nor of its right to resort to the courts, nor may the legislature take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws.⁶

Compliance With Statutory Provisions.

§ 42. In General—Conditions Precedent.—It has been said that the whole process of incorporation, by which an imaginary, invisible, intangible legal entity is brought into

4. *Spring Valley Water Works v. San Francisco*, 61 Cal. 18; *San Joaquin etc. Irr. Co. v. Stanislaus County*, 113 Fed. 930 (holding that where charter had provided that rates should not be fixed to yield stockholders less than a certain return, where the corporation in fixing its own rates for twenty-five years had never fixed them high enough to return such minimum, its constitutional rights were not impaired by a subsequent statute authorizing the fixing of its rates below the minimum). As to vested rights generally. see CONSTITUTIONAL LAW, vol. 5, p. 747.

5. *San Joaquin etc. Irr. Co. v. Stanislaus County*, 113 Fed. 930.

6. *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557 (holding that the legislature in the exercise of the reserved power cannot deprive a corporation of any of its substantial property or property rights); *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304.

The state in passing or amending general laws under which corporations may be formed or altered possesses no power to withdraw them from the guaranties of the federal constitution. The Railroad

contemplative existence, is an artificial one.⁷ The right to be a corporation is in itself a franchise, and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with.⁸ Certain things are made conditions precedent in such statutory process. Thus, it is a general rule that where the statute requires articles of incorporation to be filed before the proposed corporation is authorized to engage in the business for which it has been created, the filing of the articles in the manner prescribed constitutes a condition precedent to the right to perform corporate functions.⁹ Likewise, the omission of statements required to be contained in the articles of incorporation or other necessary prerequisites will prevent the formation of a *de jure* corporation.¹⁰

§ 43. Substantial Compliance.—Although a compliance with statutory conditions is necessary to an incorporation, nevertheless a substantial rather than a literal compliance will suffice¹¹ to show a corporation *de jure*,¹² or a corporation *in esse*.¹³ Although a substantial compliance will

Tax Cases, 13 Fed. 722, 8 Sawy. 238. See *San Joaquin etc. Irr. Co. v. Stanislaus County*, 113 Fed. 930, holding that a corporation may not be deprived under the legislative power of the fruits actually reduced to possession of contracts lawfully made. See CONSTITUTIONAL LAW.

7. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

8. *People v. Selfridge*, 52 Cal. 331.

9. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *California etc. Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598. See Civ. Code, § 296.

10. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368;

People v. Selfridge, 52 Cal. 331. As to *de jure* and *de facto* corporations, see *infra*, §§ 65-72.

11. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *People v. Golden Gate Lodge No. 6*, 128 Cal. 257, 60 Pac. 865; *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *People v. Stockton etc. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178; *People v. Chambers*, 42 Cal. 201; *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354; *Harris v. McGregor*, 29 Cal. 124; *Mokelumne Hill etc. Min. Co. v. Woodbury*, 14 Cal. 424.

12. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354. See *infra*, §§ 65-72.

13. *Harris v. McGregor*, 29 Cal. 124; *Mokelumne Hill etc. Min. Co.*

suffice, it does not follow that any positive statutory requirement may be dispensed with on the ground that it is unimportant. Where there is a substantial compliance the thing required is done, but not literally, as directed, and there is no omission of the requirement.¹⁴ Thus, where a payment of ten per cent of capital is required in cash, if from accident, inadvertence or some other unintentional cause there should be a failure to pay an insignificant portion of the ten per cent, it might not vitiate the act of incorporation; but a payment in other than cash is not a substantial compliance.¹⁵ So, where the place of business is not described as the principal place of business, this is a mere technical error not avoiding the charter;¹⁶ but where the statute requires the names of the city or town and county in which the principal place of business is to be located, and a statement is made only of the county in which the operations are to be carried on, this is not a substantial compliance with the statute.¹⁷

Incorporators.

§ 44. **In General.**—Private corporations may be formed by the voluntary association of any three or more persons as provided in the Civil Code. A majority of such persons, however, must be residents of California.¹⁸ Other provisions of the code indicate that the minimum number of incorporators shall be three, as for instance, the provision with reference to signing the articles,¹⁹ and as to the

v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

14. *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

15. *People v. Chambers*, 42 Cal. 201.

16. *Ex parte Spring Valley Water Works*, 17 Cal. 132.

17. *Harris v. McGregor*, 29 Cal. 124.

18. Civ. Code, § 285. See, *Smith v. Sinbad Development Co.*, 15 Cal. App. 166, 113 Pac. 701, holding that where a corporation is organized under the laws of another state with only two incorporators, if incorporation is admitted by the pleadings it must be assumed that two persons may organize under the laws of such state.

19. Civ. Code, § 292.

number of directors.²⁰ A provision as to a special class of corporations that "any number of persons" may incorporate themselves is not inconsistent with the provisions of section 285 of the Civil Code, which otherwise apply to all corporations.¹ Although it has been said that statutes in regard to the formation of corporations do not authorize any but natural persons to become corporators,² nevertheless there is no decision directly to this effect. In this connection it is to be noted that the word "person" is generally held to include "corporation,"³ and in the case of consolidation, corporations are really the incorporators of the new consolidated corporation.⁴ However, if it be assumed that the laws of California conferring the right to form corporations do not limit it to individual persons, it is nevertheless clear that the purposes of the incorporators as expressed in the articles may include the subscription to shares in other corporations and the assumption of the resulting liabilities.⁵

§ 45. Liability in Case of Defective Organization.—The result of an abortive attempt to organize a corporation is not necessarily a partnership or joint stock company.⁶ Where persons knowingly and fraudulently assume or pretend to have a corporate existence, they may be held liable as individuals; but where they are acting in good faith and suppose that they are stockholders in a valid corporation, and where the corporation assumes to transact business for a number of years and the assumed corporate existence is not challenged by the state, then they cannot be held so liable.⁷ And the principle which thus shields the mem-

20. Civ. Code, § 290.

1. *People v. Golden Gate Lodge*

No. 6, 128 Cal. 257, 60 Pac. 865.

2. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

3. See *supra*, § 4.

4. See *infra*, § 56.

5. *Pauly v. Coronado Beach Co.*, 56 Fed. 428.

6. *Blanchard v. Kaull*, 44 Cal.

440.

7. *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901 (citing authority to the point). See note as to liability of incorporators upon defective attempt to incorporate, in 4 Cal. Law Rev. 336. And see *infra*, §§ 65-72.

bers from the claims of persons dealing with the corporation where the corporation is organized and its affairs conducted in the honest belief that it is legally formed—there being no fraud either in the organization of the corporation or in the conduct of its affairs—is equally efficacious to protect the members as between themselves.⁸ In the absence of fraud the members are all parties to whatever has been done and stand in equal relation to all the facts. They are in *pari delicto*, and members who have paid in money cannot, after failure of the scheme, hold the agents and incorporators personally liable therefor.⁹

Articles and Certificate.

§ 46. In General.—The instrument by which a private corporation is formed is called “articles of incorporation.”¹⁰ The code provides explicitly what the articles shall contain and the manner in which they shall be executed and filed.¹¹ Persons dealing with a corporation are bound to take notice of the contents of the articles which are regularly filed.¹² Whenever articles have been destroyed by fire or other calamity, a copy of the certified copy thereof filed in the office of the secretary of state pursuant to section 296 of the Civil Code, duly certified, may be filed in the office of the county clerk of the county where the articles were on file at the time of their destruction, and a certified copy so filed has the same force and effect as the destroyed document.¹³

§ 47. Contents of Articles.—*In general.*—Under the heading of “Articles of Incorporation—What They shall

8. *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901.

9. *Meyer v. Bishop*, 120 Cal. 204, 61 Pac. 919; *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901. See *infra*, § 367 et seq., as to proportionate liability of stockholders generally.

10. Civ. Code, § 289.

11. See *infra*, §§ 47, 48, 50, 51.

12. *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901 (members); *J. W. Williams Co. v. Leong Sue Ah Quin*, 30 Cal. App. Dec. 531, 186 Pac. 401.

13. Civ. Code, § 297a.

Contain," section 290. of the Civil Code specifically enumerates, in various distinct subdivisions, the matters or facts which such instrument must contain, or, in other words, the matters which must be embodied in the original articles in order legally to constitute them such an instrument. That section contains the only general provisions of the law as to matters or facts to be contained in the articles, and, therefore, in the absence of provisions requiring other matters and things, the specific enumeration of the various facts necessarily implies the exclusion *ex industria* of any other matters than those thus specifically named. Thus, certificates of acknowledgment of the execution of the articles are not referred to and are not an essential part of the articles themselves.¹⁴ But the articles must contain, in substance at least, the things required by section 290 of the Civil Code,¹⁵ otherwise the persons signing them do not form a corporation *de jure*.¹⁶ The provisions of section 290 are applicable to all corporations, including benevolent corporations, incorporated in California, unless provision is otherwise made by special statute.¹⁷ The matters required to be set forth in the articles are considered in the subdivisions following.

(1) *Name*.—The name of the corporation must be set forth in the articles;¹⁸ and this name must not, of course, bear such a close resemblance to the name of another corporation as will tend to deceive. The secretary of state is forbidden to file the copy of the copy of articles or to issue the certificate of incorporation where a violation of this provision occurs.¹⁹ The statutes also forbid the use of certain words as a part of the corporate name of ordi-

14. *California etc. Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

15. See *supra*, § 43.

16. *People v. Flint*, 64 Cal. 49, 28 Pac. 495. As to *de facto* corporations, see *infra*, §§ 65-72.

17. *People v. Golden Gate Lodge*

No. 6, 128 Cal. 257, 60 Pac. 865.

18. Civ. Code, § 290, subd. 1. See, in general, as to name, *infra*, § 83 et seq.

19. Civ. Code, § 296. See *infra*, § 49; and *infra*, § 85, as to conflicts in name.

nary corporations, as, for instance, the words "trust" or "trustee";²⁰ and words indicating a banking business cannot be used unless the corporation is properly organized and authorized to do such business.¹ Where a statute requires the articles to specify the name by which the trustees are to be called and known, the object is to require a statement of the name of the corporation or society, and where the language of the articles sets forth the corporate name rather than the name by which the trustees are to be known, it is a sufficient compliance, as it secures the object of the statute—the adoption of a name under which the trustees may transact business.²

(2) *Corporate purposes.*—The articles must state the purpose for which the corporation is formed.³ A private corporation may be formed for any purpose for which individuals may lawfully associate themselves;⁴ but it cannot by incorporation effect an unlawful purpose.⁵ Thus, a corporation may be formed for such purposes as the following: to effect a liquidation and the distribution of the proceeds of property among the owners thereof;⁶ to purchase, hold and sell lands generally;⁷ to deal in the stock

20. Civ. Code, § 290½.

1. Bank Act, §§ 12, 12a. See BANKS, vol. 4, p. 116 et seq.

2. Roman Catholic Orphan Asylum v. Abrams, 49 Cal. 455.

3. Civ. Code, § 290, subd. 2. See as to corporate powers in general, infra, § 542 et seq.

4. Civ. Code, § 286.

5. See Spurgeon v. Santa Ana etc. Irr. Co., 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140, holding that incorporators cannot by the purposes set forth in an incorporation make their property exempt from execution.

6. Baldwin v. Miller & Lux, 152

Cal. 454, 92 Pac. 1030 (holding such distribution not in violation of Civ. Code, § 309, prohibiting a reduction of the capital stock).

7. Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

A corporation may be formed also for the purpose, among other things, of buying and "improving" real estate with a view of selling it at an enhanced value; Vandall v. South San Francisco Dock Co., 40 Cal. 83 (holding that while the word "improve," as employed in articles of incorporation may mean "speculating," it is not restricted to such meaning).

of other corporations;⁸ to enter into a partnership;⁹ to dispense charities;¹⁰ and to carry on certain specified public service activities.¹¹ In respect to this last-mentioned class of corporations it has been held that the purposes avowed in the articles do not fix the character of the corporation as a public service corporation, but merely serve to give the corporation capacity to engage in such public service.¹²

(3) *Principal place of business.*—The “place where the principal business is to be transacted” must be set forth in the articles.¹³ This, in effect, fixes the residence of the

8. *Market Street Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

9. *Mervyn Investment Co. v. Biber*, 184 Cal. 637, 194 Pac. 1037.

10. The character of a charitable corporation is not to be determined alone by the powers of the corporation as defined in its charter but also by the manner of conducting its institution; *Stewart v. California etc. Benevolent Assn.*, 178 Cal. 418, 176 Pac. 46; *Estate of Dol*, 182 Cal. 159, 187 Pac. 428. See *CHARITIES*, vol. 5, p. 1.

11. See *FERRIES; PUBLIC SERVICE; RAILROADS; SLEEPING-CAR COMPANIES; STREET RAILWAYS; TELEGRAPHS AND TELEPHONES; THEATERS, SHOWS AND PUBLIC RESORTS; TURNPIKES AND TOLL ROADS; WHARVES.*

The fact that articles of a manufacturing and lumbering company contain powers to operate tramways and railroads in connection therewith, does not require the corporation to be organized as a railroad corporation; *People v. Mt. Shasta Mfg. Co.*, 107 Cal. 256, 40 Pac. 391.

Where it appears from the articles that the purpose of the corporation is to operate a street railroad, it is not necessary that the corporation's articles comply with provisions for railroad corporations; *Huntington v. Curry*, 14 Cal. App. 468, 112 Pac. 583 (holding §§ 291, 293, 294 and 295, Civ. Code, inapplicable to street railroad corporations). See *People v. Blake*, 19 Cal. 579, holding that a corporation organized to furnish water to a municipality is a corporation within an act providing for the formation of corporations for the purpose of engaging in any species of trade, foreign or domestic.

12. *Allen v. Railroad Commission*, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466; *Del Mar Water etc. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948; *Transcontinental Tel. Co. v. Neylan*, 34 Cal. App. 379, 167 Pac. 541.

13. Civ. Code, § 290, subd. 3; *Stockton Gas etc. Co. v. San Joaquin County*, 148 Cal. 313, 7 Ann. Cas. 511, 5 L. R. A. (N. S.) 174, 83 Pac. 54; *Chapman v. Doray*, 89 Cal. 52, 26 Pac. 605.

corporation.¹⁴ The principal place of business contemplated is the principal office at which the books of the corporation are to be kept and where its officers meet for the purpose of transacting the company's business. So, where the statute requires the articles to show the city or town and county in which the principal place of business is located, a designation merely of the county and state where the "operations" of the company are to be carried on, is not sufficient.¹⁵ But failure to specify the principal place of business will not, of course, affect the existence of the corporation de facto or by estoppel.¹⁶ It has been held that a failure to describe the place of business as the principal place of business is a mere technical error.¹⁷ And where a statute does not so require, the articles need not contain a statement of the county in which the corporation shall be situated.¹⁸

(4) *Term of existence.*—The articles must specify the term for which a private corporation is to exist—not exceeding fifty years,—¹⁹ which may, however, be extended by proper proceedings.²⁰ The code provides that "Every corporation, as such, has power of succession, by its corporate name, for the period limited; and when no period is limited, perpetually."¹ But in view of the limitations placed by the law on the period for which private corporations,² and corporations of certain classes, as, for example, homestead corporations, are to exist,³ the term "perpetual" as used in section 354 of the Civil Code applies more especially to public, quasi-public, and such other corporations as are not limited in point of time.⁴

14. See *infra*, § 99 et seq.

15. *Harris v. McGregor*, 29 Cal. 124.

16. *Parrott v. Byers*, 40 Cal. 614; *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354.

17. *Ex parte Spring Valley Water Works*, 17 Cal. 132.

18. *Roman Catholic Orphan Asylum v. Abrams*, 49 Cal. 455.

19. Civ. Code, § 290, subd. 4.

20. See *infra*, § 62.

1. Civ. Code, § 354, subd. 1.

2. See Civ. Code, §§ 290 (subd. 4) and 296.

3. See *supra*, § 26.

4. See *supra*, § 22, as to corporations sole; *supra*, § 23 et seq., as to public and quasi-public corporations generally.

(5) *Statements concerning directors.*—The code provides that the articles must set forth the number of directors or trustees which shall not be less than three, and the names and residences of those appointed for the first year. But corporations to be formed for purposes other than profit may be controlled by such number of directors as the constitution and by-laws may provide.⁵ Omission of the name and number of the first directors from the articles will not prevent the de facto existence of the corporation.⁶ The powers and duties of directors appointed in the articles to serve for the first year are treated of elsewhere,⁷ as is also the change in the number of directors.⁸ The naming of the corporate officers is not a matter within the power of the incorporators to be set forth in the articles, but is a duty devolving upon the board of directors.⁹

(6) *Capital stock.*—The articles of a corporation must likewise set forth: "The amount of its capital stock, and the number of shares into which it is divided and the par value thereof. . . ."¹⁰ If the stock is classified as preferred and common, the articles must state the number of shares of stock to which preference is granted and the number to which no preference is granted, together with a statement of the nature of the preference, and within the limitations prescribed by law.¹¹ Likewise a corporation issuing shares of no par value¹² must make certain state-

5. Civ. Code, § 290, subd. 5. In 1905 the legislature changed the number of directors or trustees to "three" instead of "five," as theretofore were necessary. See *infra*, § 422. As to annual statement of the names and residences of directors, see Corporation License Act, § 3a, added by Stats. 1921, p. 1424.

6. Oroville etc. R. Co. v. Plumas County, 37 Cal. 354.

7. See *infra*, § 418.

8. See *infra*, § 422.

9. *Bideout v. National Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192.

10. Civ. Code, § 290, subd. 6.

11. Civ. Code, § 290, subd. 6. As to preferred stock, see *infra*, §§ 142, 143.

12. See *infra*, § 145.

ments in its articles, in lieu of the statements prescribed in section 290 as to the amount of capital stock, number of shares into which divided, the par value thereof, and the nature of the preferences, if any.¹³ The articles may also make provision for the issue of stock to employees or those who conduct the business of the corporation as additional compensation for services or by way of sale.¹⁴

(7) *Amount of stock subscribed.*—If there is capital stock, the articles must show the amount actually subscribed and by whom.¹⁵ This provision was contained in the original enactment of section 290 in 1872, but by amendment in 1873 it was omitted.¹⁶ Between this last-mentioned date and the date of the re-enactment of the provision in 1876, the articles were not required to contain a statement of the number of shares of the capital stock subscribed and by whom.¹⁷ Those who sign the articles act for the real subscribers in setting forth these matters. If the statement in the articles is incorrect, nevertheless they will limit the power of the corporation to hold as stockholders as of the date of filing to those named in the articles and to the amounts therein mentioned.¹⁸

§ 48. Subscription and Acknowledgment.

“The articles of incorporation must be subscribed by three or more persons, a majority of whom must be residents of this state, and acknowledged by each. . . . [And] the signature of each person named in said articles of incorporation as directors of such corporation shall be affixed to said articles of incorporation and acknowledged, etc.”¹⁹

13. See Stats. 1917, p. 1321.

14. Stats. 1921, p. 32, § 2. See, also, *infra*, § 308.

15. Civ. Code, § 290, subd. 7.

16. See Stats. 1873-74, p. 199.

17. *People v. Leonard*, 106 Cal. 302, 39 Pac. 617.

18. *Monterey etc. R. Co. v.*

Hildreth, 53 Cal. 123 (not deciding, however, whether or not one not named as subscriber, but who had in fact subscribed, could have the articles declared null or claim the right to be admitted as a member).

19. Civ. Code, § 292.

Compliance with these provisions is an express condition precedent to a valid incorporation,²⁰ and the requirements as to acknowledgment under this code provision are applicable to articles of incorporation of social or benevolent corporations¹ in addition to the requirements for verification under section 594 of the Civil Code,² where not inconsistent with the provisions required to be stated under section 290 of that code.³ But whether or not the incorporation paper is signed and acknowledged by all the directors named in the body of it,⁴ or acknowledged by all,⁵ or otherwise verified as required by statute, is not material upon collateral attack,⁶ although it is fatal on a direct attack upon the corporate existence.⁷

The primary purpose of the requirement that the articles shall be acknowledged by the persons designated in section 292 of the Civil Code is to secure the state and all concerned against the possibility of any fictitious names being subscribed and it furnishes proof of the genuineness of the signatures.⁸ The certificate of acknowledgment, how-

20. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236. And cases cited *infra*.

1. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *People v. Golden Gate Lodge No. 6*, 128 Cal. 257, 60 Pac. 865.

2. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *People v. Golden Gate Lodge No. 6*, 128 Cal. 257, 60 Pac. 865 (holding that sections 593 and 594 of the Civil Code, providing for the incorporation of any number of persons associated together for any purpose where pecuniary profit is not their object, must be read in connection with section 292 as not providing for the incorporation of any number less than five [now three] persons).

3. See Stats. 1917, p. 830.

4. *Larrabee v. Baldwin*, 35 Cal. 155.

5. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354; *Dannebrog etc. Min. Co. v. Allment*, 26 Cal. 286.

6. *McCann v. Children's etc. Society*, 176 Cal. 359, 168 Pac. 355; *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

7. *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

8. *People v. Golden Gate Lodge No. 6*, 128 Cal. 257, 60 Pac. 865; *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *California etc. Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

ever, is not an essential part of the articles themselves any more than the acknowledgment of a deed—a prerequisite of the right to record it—is made by statute a part of the deed proper; but without this kind of proof of due execution, the officers in whose offices the articles and copies are to be filed would have no authority to file the same, or if they did file them there would still be no legally constituted corporate entity.⁹ It is not necessary to the validity of the corporation, or to the subscribers to stock who agree to its formation becoming stockholders, that they should all sign the articles,¹⁰ for in such case those who sign act as agents of the others.¹¹

§ 49. Articles and Certificate as Evidence.—A copy of any articles of incorporation filed in pursuance of the code provisions, and certified by the secretary of state, constitutes prima facie evidence of the facts therein stated.¹² Hence, a court does not err in admitting in evidence such certified copy from the office of the secretary of state, although it is but a copy of a copy;¹³ and the fact that the copy had been erroneously filed with the county clerk of the

9. *California etc. Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

10. *San Joaquin Land & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

11. *San Joaquin Land and W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349. But see *Monterey etc. R. Co. v. Hildreth*, 53 Cal. 123, holding that the signing of an agreement to take stock in a corporation before the incorporation thereof does not constitute the subscriber a stockholder in the sense to make him liable for assessments subsequently levied.

12. Civ. Code, § 297. Prior to the amendment of 1921, this section permitted copies of articles

certified by the county clerk of the county where the original articles were filed to be received as prima facie evidence of the facts therein stated.

The existence of a corporation is proved by its articles of incorporation executed and filed in accordance with law; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434.

For such proof the certified copy provided for in section 297 of the Civil Code is proper evidence; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22.

13. *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *Vance v. Kohlberg*, 50 Cal. 346.

county in which the principal place of business was situated does not militate against it as evidence.¹⁴ So a court does not err in excluding a paper purporting to be a copy of the articles where there is no proof that the original articles ever existed.¹⁵

The articles are *prima facie* evidence only;¹⁶ and the mere fact that they are introduced, and are sufficient *prima facie* to show corporate existence, does not justify the court in holding that other evidence to show a *de facto* existence is not admissible.¹⁷ The articles are, of course, evidence only of the facts therein stated.¹⁸ They are, moreover, admissible to show when a corporation was incorporated.^{18a} And where they do not set forth facts required by statute they are not evidence of even a corporation *de jure*.¹⁹ The copies filed with the several county clerks under the provisions of the code have the same force and effect in evidence as the originals,²⁰ and they are not in any sense secondary evidence.¹ So, too, the certificate of incorporation issued under section 296 of the Civil Code is primary evidence of the facts which it purports to declare and publish; and it is not only the best possible evidence of its contents, but the best evidence as well of the incorporation.² But

14. *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22.

15. *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

16. *Boea etc. R. Co. v. Sierra etc. R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

17. *Vallejo etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

18. *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089.

18a. *Berry v. San Francisco & North Pac. R. Co.*, 50 Cal. 435.

19. *McCallion v. Hibernia Sav. etc. Soc.*, 70 Cal. 163, 12 Pac. 114;

People v. Selfridge, 52 Cal. 331; *Harris v. McGregor*, 29 Cal. 124; *Mokelumne etc. Min. Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658.

20. Civ. Code, § 299. Prior to amendment in 1921 it provided that certified copies of the copies filed with the county clerks had the same force as the originals.

1. *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22.

2. *Creditors' Union v. Lundy*, 16 Cal. App. 567, 117 Pac. 624. See EVIDENCE as to admission of secondary evidence of lost or destroyed instruments.

clearly the certificate of the secretary of state that he issued a certificate of incorporation, that is, his certificate reciting that the articles were filed in his office on a certain date and that a certificate of incorporation thereof issued on said date, is not admissible.³

§ 50. Filing Articles and Issuance of Certificate.—Prior to amendment in 1921, section 296 of the Civil Code provided for the filing of articles originally with the county clerk of the county in which the principal business of the company was to be transacted, and a certified copy with the secretary of state.⁴ But in 1921 the whole method of filing corporate papers was changed, reversing the procedure theretofore prevailing in this respect. Now the original articles are filed in the office of the secretary of state. Upon such filing the secretary of state must issue to the corporation, over the great seal of the state, a certificate that the original articles containing the required statement of facts have been filed in his office; and thereupon the persons signing the articles and their associates and successors become a body politic and corporate by the name stated in the certificate and for the term of fifty years, unless it is in the articles otherwise stated or in the code otherwise specially provided.⁵ No corporation may

3. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

4. See Civ. Code, § 296, as it read prior to 1921; and see *Stats.* 1921, p. 125, for the amendment. Under the old procedure in filing, if filed with the recorder instead of with the county clerk, it was held not to be a compliance with the law (*Bakersfield etc. Assn. v. Chester*, 55 Cal. 98). However, if filed with the county clerk who was ex-officio recorder and erroneously marked by him as filed in the recorder's office, there was a substantial compliance (*San Diego Gas*

Co. v. Frame, 137 Cal. 441, 70 Pac. 295). On account of the chance of error in filing under the old system, it was necessary to have section 363 of the Civil Code enacted providing for the correction of erroneous filings.

5. Civ. Code, § 296. See, construing section 296 prior to the amendment: *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889, holding that upon the issuance of the certificate, the corporation is brought into existence with all corporate rights and powers given by statute; *Wall v. Mines*, 130 Cal.

transact any business, however, until it shall have filed in the office of the county clerk of the county in which its principal business is to be transacted a copy of its articles of incorporation certified by the secretary of state.⁶

The secretary of state may properly refuse to file the original articles, or issue any certified copy thereof, or issue any certificate of incorporation to any incorporation whose articles set forth the name of any existing corporation organized in California, or a name so closely resembling the name of such corporation as will tend to deceive;⁷ and also where the articles themselves do not contain the matters and things prescribed by statute,⁸ or contain provisions in violation of law.⁹ Furthermore, the secretary of state has no authority to issue a certificate without the articles coming to him.¹⁰ Where, however, the articles conform to legal requirements, mandamus will lie to compel the secretary of state to file the same upon tender of fees, and to issue the proper certificate.¹¹

27, 62 Pac. 386, holding that prior to issuance of the certificate the corporation has no de jure existence, and that the word "thereupon" in section 296 of the Civil Code has the effect of making the issuance a necessary prerequisite to corporate life; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368, holding that the filing prescribed by the section is a condition precedent in the statutory process of incorporation.

6. Civ. Code, § 296. See *infra*, § 51 et seq.

An erroneous filing of the articles with the clerk of a county other than the proper one under the old provisions may be corrected by the proceeding prescribed therefor by the code, with like effect as if the original filing were correctly made. See Civ. Code, § 363, providing for

court proceeding for withdrawal of original articles and refiling in the proper county, upon petition of any stockholder or director of the corporation.

7. Civ. Code, § 296. See *supra*, § 47.

8. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

9. *Film Producers v. Jordan*, 171 Cal. 664, 154 Pac. 605 (unlawful preference granted to stock).

10. See *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341, and *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386, under the old provision requiring only the filing of a certified copy of the articles.

11. *Huntington v. Curry*, 14 Cal. App. 468, 112 Pac. 583. See *Ex parte Spring Valley Water Works*,

§ 51. Filing Copies in Counties.—The code provides for the filing, within the times specified therein, of a certified copy of the articles of incorporation filed in the office of the secretary of state, in all counties in which the corporation may purchase, locate or hold property. The provision applies to all corporations whether formed under the provisions of the code or not, and it requires such filing except where certified copies have already been filed in such county, "or where original articles are on file under an act in force at the time of filing thereof."¹² Prior to the amendment in 1921 of section 299 and other sections of the Civil Code, the only document required to be filed with the county clerk of the county not its principal place of business was the copy of the copy of the articles certified by the secretary of state.¹³ Following the amendment, a certified copy of the articles is required to be filed in such counties.¹⁴ Section 299 obviously did not apply to foreign corporations before they were required to file their articles with the secretary of state,¹⁵ and although the

17 Cal. 132, where mandamus is issued to compel a county judge to perform the duties imposed on him by law in connection with an incorporation. See *Tognazzini v. Jordan*, 165 Cal. 19, 130 Pac. 879 (amended articles); *California Tel. and Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598 (amended articles). See, also, *Film Producers, Inc., v. Jordan*, 171 Cal. 664, 154 Pac. 605 (writ denied); *City Properties Co. v. Jordan*, 163 Cal. 587, 126 Pac. 351 (writ denied); *Bullfrog, Goldfield R. Co. v. Jordan*, 174 Cal. 342, 163 Pac. 40 (foreign corporation, writ denied).

12. See Civ. Code, § 299. See *infra*, § 52, as to disabilities and liabilities for failure to comply with the code provision.

This section was amended by

the legislature of 1921, to conform to the new method of filing of articles provided for by section 296 and other sections of the Civil Code as amended in 1921. See *supra*, § 50. Under the provisions of the section prior to the amendment, it was held that the county of the principal place of business was not a county in which the copy might be filed. *San Diego Gas Co. v. Frame*, 148 Cal. 252, 82 Pac. 1049; and see *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22, where this is assumed, but not decided.

13. *California etc. Loan Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525.

14. Civ. Code, § 299.

15. *South Yuba Water etc. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222.

section purports only to apply to domestic corporations,¹⁶ yet it has been applied to foreign corporations required to file their articles with the secretary of state.¹⁷ The filing of the articles of foreign corporations with the secretary of state and with the county clerks of the counties in which the corporation owns real property and in which it has its principal place of business in this state is provided for by the Corporation License Act.¹⁸ Whether it is expedient that foreign corporations should comply with provisions of the section is, it has been observed, a matter for the legislature to determine.¹⁹ At any rate, the section refers only to corporations whose articles are required to be filed with the secretary of state, and thus a corporation sole is not required to comply therewith.²⁰ And it is not entirely certain as to whether the section has any application to the case of a de facto corporation which has never filed valid articles.¹

§ 52. Failure to File Copies in Counties.—Section 299 of the Civil Code further provides that

“Any corporation failing to comply with the provisions of this section cannot maintain or defend any action or proceeding in relation to such property, its rents, issues, or profits, until such certified copy of its articles of incorporation are filed at the places directed by the general law and this section.”

And all corporations are made liable in damages “for any and all loss that may arise by the failure of such

16. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

17. *Ward Land etc. Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426. See *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080, where the question was raised, but not decided, whether article XII, section 15, of the constitution would not make section 299 applicable to foreign corporations.

18. *Stats.* 1917, p. 371, § 1, as

amended by *Stats.* 1921, p. 638. See, also, *infra*, § 693.

19. *South Yuba Water etc. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222.

20. *Mora v. Murphy*, 83 Cal. 12, 23 Pac. 63 (as to pre-code corporations).

1. See *McCann v. Children's Home Soc.*, 176 Cal. 359, 168 Pac. 355, where it was assumed that the section did have application.

corporation to perform any, of the foregoing duties within the time mentioned" in the code provision.

And the same penalties are provided for failure to file amended articles, and copies thereof.² However, a failure to comply with the section does not impose on the corporation a loss or forfeiture of its property or impair or deprive it of any cause of action or defense it may have in reference to such property.³ As section 299 of the Civil Code imposes a penalty, it is strictly construed.⁴ It does not forbid corporations failing to comply with its provisions from acquiring property either by purchase or by condemnation in eminent domain proceedings. The holding of property is very different from an attempt to acquire a holding. But where, in eminent domain proceedings, the plaintiff finds it necessary to tender a material issue as to the ownership of the property in the county in order to support the action, it cannot be maintained without compliance with the code provision.⁵ And since a mortgagee does not own or hold the mortgaged property, under the rule in California, it is not necessary for a corporation mortgagee to comply with the section in order to maintain an action for foreclosure.⁶ It has been held that an action brought against a corporation to recover for work and labor done at its instance and request is not within the prohibition of the section, even though the work was done on the property.⁷

§ 53. Pleading Failure to File Copies.—Even where the provisions of section 299 of the Civil Code are applicable, it is not necessary to aver compliance therewith in order

2. Civ. Code, § 362.

3. California Savings etc. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525.

4. Savings & Loan Soc. v. McKoon, 120 Cal. 177, 52 Pac. 305.

5. Emigrant Ditch Co. v. Webber, 108 Cal. 88, 40 Pac. 1061.

6. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080; Savings & Loan Soc. v. McKoon, 120 Cal. 177, 52 Pac. 305. See MORTGAGES.

7. Weeks v. Garibaldi etc. Min. Co., 78 Cal. 599, 15 Pac. 302.

to state a cause of action;⁸ nor is compliance therewith a jurisdictional element in the suit.⁹ The failure to comply with the section is a mere matter of abatement, which must be specially pleaded by the other party, otherwise it is waived;¹⁰ and the pleading thereof should be strictly construed.¹¹ A denial of corporate existence does not raise the question;¹² and the objection cannot be raised for the first time on appeal.¹³ The objection should be made when the defendant is introducing his evidence or at least at the conclusion of it. If not made at the trial, it must be deemed waived.¹⁴ Where the corporation is plaintiff, the filing of the copy of articles after commencement of the suit and before filing of a plea directed to the defect will entitle it to maintain the action.¹⁵ Since section 299 of the Civil Code does not declare that the

8. *California Savings etc. Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525; *South Yuba Water etc. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222; *Ontario State Bank v. Tibbits*, 80 Cal. 68, 22 Pac. 66.

9. *California Savings etc. Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525.

10. *California Savings etc. Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525; *South Yuba Water etc. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222; *Ontario State Bank v. Tibbits*, 80 Cal. 68, 22 Pac. 66; *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886; *Riverdale Min. Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896; *Boca etc. R. Co. v. Sierra etc. R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

11. *Ontario State Bank v. Tibbits*, 80 Cal. 68, 22 Pac. 66 (holding that a separate defense that plaintiff at commencement of action had not legal capacity to sue is purely a conclusion of law and of itself tenders no issue of fact). See ABATEMENT AND REVIVAL, vol. 1, p. 80.

12. *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886.

13. *California Savings etc. Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525; *Labory v. Los Angeles Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

14. *Labory v. Los Angeles Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

15. *McCann v. Children's Home Soc.*, 176 Cal. 359, 168 Pac. 355; *California Savings etc. Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525; *Riverdale Min. Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896 (where plea was not made by answer, but amendment to set forth the plea was permitted only on condition that the corporation be permitted before submission of the case to introduce proof of compliance, under such circumstances, it was held that the disability having been removed before the close of the case the corporation was properly permitted to show its capacity to maintain the action).

action shall not be commenced by the corporation unless it has filed a certified copy of its articles, but merely declares that it shall not maintain the action until it has filed it,¹⁶ the rule is that where the corporation is defendant and files the certified copy before making answer, the right to defend the action is not affected.¹⁷ And even though the action is permitted to abate by reason of sustaining the plea, it would not operate to bar another suit on the merits after removal of the disability.¹⁸

§ 54. Amendment of Articles in General.—Pursuant to a code provision, any corporation organized under the laws of California may amend its articles of incorporation for any or all of the following purposes: to set forth a new name; to alter or repeal or add to provisions relative to its purposes; to change its principal place of business; to state a date to which its term of existence has been extended; to increase or diminish its number of directors; to increase or diminish the amount of its capital stock or the number of shares and the par value thereof; to provide for the classification of its stock into preferred and common shares; or to change the nature and extent of preference; and generally to make any other amendment not contrary to law.¹⁹ But the same section of the code provides that

16. *Ward Land etc. Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426; *California Savings etc. Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525. See *Nicholson v. Auburn Gold etc. Co.*, 6 Cal. App. 547, 92 Pac. 651, under Civ. Code, § 2468, relating to partnerships, but discussing the effect of § 299, Civ. Code.

17. *McCann v. Children's Home Soc.*, 176 Cal. 359, 168 Pac. 355.

18. *Riverdale Min. Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896.

19. Civ. Code, § 362 (stated in substance). See *infra*, § 87 et seq.,

as to effecting change of name; *infra*, § 101, as to effecting change of principal place of business; *infra*, §§ 61, 62, as to extending or reducing term of existence; *infra*, § 422, as to change in number of directors; *infra*, § 147 et seq., as to increase or reduction of capital stock; and *infra*, § 142, as to preference given stock. See *infra*, § 55, as to execution and filing of amendments.

Prior to the amendment of 1915, the term of existence might be reduced by mere amendment to the

"No corporation shall amend its articles of incorporation to alter the statements which appear in the original articles of the names and residences of the first directors or the statements which appear in such originals, of the amount of capital stock subscribed and by whom. Nothing appearing herein shall be construed as permitting a corporation to change its name, or its principal place of business, extend or reduce its term of existence, or increase or diminish its number of directors or its capital stock, by amending its articles of incorporation."

And that

"Nothing contained in this section must be construed to cure or amend any defect existing in the original articles of incorporation, where such defect is of such character as to render such original articles invalid."

A change in the constitution or by-laws of a benefit association, however, is not an amendment of its articles within the meaning of section 362.²⁰

§ 55. Execution and Filing of Amendments.—Articles of incorporation may be amended by a majority vote of the board of directors and by the vote or written assent of the holders of at least two-thirds of its subscribed capital stock, or if there be no capital stock, then by majority vote of the board of directors and the vote or written assent of a majority of the members. Upon the adoption of amended articles, a copy thereof must be certified to as correct by the president and secretary and a majority of the directors and the corporate seal affixed to the certificate. The certificate is also required to set forth the proceedings by virtue of which the amended articles were adopted.¹ While the amended articles must contain all the facts which section 290 of the Civil Code (and section 291 in case the corporation is of the class to which this last-named section applies) provides should be set forth in

articles: *Tognazzini v. Jordan*, 165 Cal. 19, Ann. Cas. 1914C, 655, 730 Pac. 879; *Nesik v. Cole*, 43 Cal. App. 130, 184 Pac. 523.

20. *Bowie v. Grand Lodge*, 99 Cal. 392, 34 Pac. 103.
1. Civ. Code, § 362.

articles of incorporation,² the statute does not require an acknowledgment to the amended articles—the certificate of the president and secretary of the corporation being a sufficient authentication thereof.³ And it has been held that the mere annexing to the amended articles of the certificate of acknowledgment to the original articles already on file adds no force to the articles as amended either as proof of the legal existence of the corporation prior to and at the time of making the amendment or of the proper adoption and due execution of the amended articles themselves.⁴

A copy of the amended articles of incorporation thus certified must be filed in the office of the secretary of state, whereupon the corporation has the same powers and the stockholders thereof are subject to the same liabilities as if the amendment had been embraced in the original articles. The secretary of state is required forthwith to issue a certified copy of the amended articles and to transmit such copy to the county clerk of the county in which the principal place of business of the corporation was situated at the time of incorporation, to be filed by such county clerk upon payment of the prescribed fee. And a copy of the amended articles certified by the secretary of state is required to be filed in the office of the county clerk of every other county in which the corporation has or holds real property.⁵ For failure to so file copies of the amended articles, the corporation is subject to the penalties prescribed in section 299 for corporations failing to file copies of the original articles.⁶ Where an amendment to the articles is not legally adopted, a suit may be maintained

2. California etc. Light Co. v. etc. R. Co., 2 Cal. App. 546, 84 Jordan, 19 Cal. App. 536, 126 Pac. Pac. 298.
598 (arguendo); Civ. Code, § 291, is

3. California etc. Light Co. v. Jordan, 19 Cal. App. 536, 126 Pac. 598; Boca etc. R. R. Co. v. Sierra

4. California etc. Light Co. v. Jordan, 19 Cal. App. 536, 126 Pac. 598.

5. Civ. Code, § 362.

6. Civ. Code, § 362. See *supra*,

by the stockholders to enjoin the corporation from acting thereunder, and an allegation that the amendment has not been adopted, which follows the language of section 362, is a sufficient allegation to show that the section was not complied with.⁷

§ 56. Organization After Incorporation.—The statute provides that if a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers shall cease, and it may be dissolved at the instance of any creditor, at the suit of the state on information of the attorney general.⁸ And a corporation is required to adopt by-laws within one month after filing articles, but no penalty for failure so to do is provided.⁹ Where the evidence, although slight, tends to show organization and transaction of business within the year and also good faith, there can be no forfeiture.¹⁰ And it has been held that where the corporation purchases materials and spends considerable money within the year in the prosecution of its enterprise, it is duly organized and entitled to exercise corporate powers.¹¹ If a preliminary organization is effected in good faith by the filing of articles, election of officers and adoption of by-laws, the company becomes a corporation *de facto*, even though the final organization is not completed within the time required by law.¹²

7. *McDermont v. Anaheim etc. Water Co.*, 124 Cal. 112, 56 Pac. 779.

8. Civ. Code, § 358. See *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140, holding that the fact that the incorporators met outside the state to organize cannot be raised on collateral attack.

9. Civ. Code, § 301. As to by-laws, see *infra*, §§ 113-125.

10. *People v. Rosenstein etc. Cigar Co.*, 131 Cal. 153, 63 Pac. 163.

11. *People v. Stockton etc. R. Co.*, 45 Cal. 306, 18 Am. Rep. 178.

12. *Stockton etc. Road Co. v. Stockton etc. R. Co.*, 45 Cal. 680.

Consolidation.

§ 57. **In General.**—Consolidation is authorized in the case of several different classes of corporations and associations, namely, banking corporations,¹³ railroad corporations,¹⁴ mining corporations,¹⁵ building and loan associations,¹⁶ co-operative business associations;¹⁷ and all corporations organized for purposes other than profit may consolidate with like corporations.¹⁸ In the consolidation of colleges and institutions of higher education under the patronage of any benevolent, religious or fraternal organization or society, having a grand lodge, assembly or conference, or other legislative or representative head in this state, the formation of a new corporation is specifically directed.¹⁹ The statutes do not authorize the consolidation of ordinary corporations organized for the purpose of profit, although, of course, the same practical result may be reached indirectly by reincorporation and transfer of assets.²⁰

§ 58. **Consent of Stockholders.**—Corporations cannot, without the consent of all their stockholders, consolidate with others, except where the power so to do is given by their charters or by a general statute existing at the date of incorporation or in those cases where the right is reserved by constitutional or statutory provision to the legislature to alter or amend charters. There is some conflict of authority as to the power of the legislature to so amend

13. See *BANKS*, vol. 4, p. 121 et seq.; *Bank Act*, § 31a.

14. *Civ. Code*, § 473. See *Vance v. Kohlberg*, 50 Cal. 346, holding that the consolidation of railroad companies may be proved by certified copies of the articles consolidating the companies. See *RAILROADS*.

15. *Civ. Code*, § 587a. See *MINES*.

16. *Civ. Code*, § 647a. See *BUILD-*

ING AND LOAN ASSOCIATIONS, vol. 4, p. 658.

17. *Civ. Code*, § 653i.

18. *Civ. Code*, § 605, under title of religious corporations.

19. *Civ. Code*, § 652. See *UNIVERSITIES AND COLLEGES*.

20. See *infra*, § 58, discussing methods of consolidation and status of the new and constituent companies.

the statute as to authorize corporations, without the consent of all the stockholders, to consolidate, but the weight of authority is clearly in favor of the position that it may do so, and that the legislature, corporation and majority are not subject to the will of dissenting stockholders.¹ The requirement as to consent of stockholders varies from two-thirds of the stockholders or members, as in the case of banking corporations,² mining corporations,³ building and loan associations,⁴ and co-operative business associations,⁵ to three-fourths in the case of railroad corporations.⁶ And in the case of nonprofit corporations, no consent of stockholders or members is provided for, but the power is given to the respective boards of directors to authorize the consolidation.⁷ The consent of the stockholders to a consolidation "in such manner as may be agreed upon by the respective boards of directors," in the absence of specific statutory directions, has been adjudged sufficient, and may be executed as well before as after action taken by the boards of directors.⁸ The consent is often required to be annexed to the articles of incorporation and consolidation themselves.⁹ Where, however, a stockholder surrenders his stock in a consolidating corporation and receives stock in the new consolidated company with full knowledge of all the facts, he thereby ratifies the acts of his agent in consenting to the consolidation.¹⁰

§ 59. Status of Companies After Consolidation.—The consolidated corporation becomes a distinct entity, a new corporation,¹¹ and as such may be organized for a term of

1. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225 (stating the rules and citing authorities).

2. *Bank Act*, § 31a.

3. *Civ. Code*, § 587a.

4. *Civ. Code*, § 647a.

5. *Civ. Code*, § 653i.

6. *Civ. Code*, § 473.

7. *Civ. Code*, § 605.

8. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

9. *Civ. Code*, § 473 (railroad corporations); *Bank Act*, § 31a (banking corporations).

10. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

11. *Isom v. Rex Crude Oil Co.*, 147 Cal. 663, 82 Pac. 319; *Market St. Ry. Co. v. Hellman*, 109 Cal.

fifty years, irrespective of the term of existence of the constituent corporations. A new corporation may as readily be created by the union of two or more corporations as by the union of individuals, and the authorities upholding the position that upon a consolidation the resulting association is a new corporation are, it has been pointed out, to be found in large number emanating from the courts of many states.¹² Thus, the persons named in the new articles of incorporation and consolidation as directors to act until their successors are elected are properly named in an action as the directors of the corporation.¹³ Since neither the consolidating corporations nor their stockholders are relieved of any just liability, notwithstanding the consolidation the corporate existence of a consolidating corporation is preserved by law to the extent that in its corporate capacity it may be called upon to meet all just liabilities.¹⁴ In California, however, the statutes relating to the consolidation of banking corporations and railroad corporations provide that the constituent corporations shall become extinct.¹⁵

§ 60. Transmission of Powers and Liabilities.—A consolidation does not relieve the constituent corporations of their liabilities. The consolidated corporation may, however, assume the antecedent liabilities, and while such

571, 42 Pac. 225 (see, also, dissenting opinion of Harrison, J., who maintained that section 358 of the Civil Code as to de facto corporations was applicable to the consolidated corporation); *Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210, 33 Pac. 53 (the consolidated corporation stands as the embodiment or representative of all the corporations); *California Central Ry. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599.

12. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

13. *California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 7 Pac. 123.

14. *Isom v. Rex Crude Oil Co.*, 147 Cal. 663, 82 Pac. 319 (holding that an appeal by a constituent corporation preserves all rights) See *California Cent. Ry. Co. v. Hooper*, 7 Cal. 404, 18 Pac. 299, where question was raised as to whether constituent corporations ceased to exist, but not decided.

15. Civ. Code, § 473 (railroad corporations); Bank Act, § 31a (banking corporations).

agreement does not bind creditors without their assent, yet suit brought by a creditor on demands so assumed is sufficient evidence of acceptance of the new debtor in lieu of the old and of the creditor's election to recover upon the assumed liability.¹⁶ The duties which a corporation owes to parties who have dealt with it previous to a consolidation, and obligations incurred by it to such parties under contracts, cannot be transferred to the new corporation, without the consent of such parties, for the effect of the exercise of such power would be to impair the obligation of contracts.¹⁷ But the creditor is not compelled to have recourse to the new company; in the absence of such election, the property of the several corporations is still liable for the debts contracted by them.¹⁸ The creditor cannot, however, prevent the consolidation; his only right is to demand that the property of the debtor corporation remain subject to his demands and that its stockholders be answerable to him to the extent of their statutory liability.¹⁹ It has been held that where a consolidation takes place, the new corporation is properly substituted as a party in place of a former one, where the regularity of the consolidation is not denied.²⁰

16. *Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210, 33 Pac. 53. And see cases cited *infra*.

17. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

The provisions of both Civ. Code, § 473, with reference to railroad corporations, and Bank Act, § 31a with reference to banking corporations, are to the effect that nothing therein shall be construed to impair the obligation of any contract to which any of such constituents were parties at the date of such consolidation, but that such contracts may be enforced by action or suit against the consolidated corporation and satisfaction obtained out of the property

which, at the date of the consolidation, belonged to the constituent which was a party to the contract, as well as out of any other property belonging to the consolidated corporation.

18. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225 (holding that claims against the constituent corporation being charges against the property of the new corporation would come within the spirit of the rule limiting indebtedness under section 309 of the Civil Code).

19. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

20. *California Cent. R. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599.

III. CORPORATE EXISTENCE.

Period.

§ 61. **In General.**—The term for which a corporation is to exist, as provided in its articles, cannot exceed a period of fifty years,¹ although if the term of existence were not limited it would be perpetual.² Upon the expiration of the term of existence, the corporation ceases to exist,³ but where, nevertheless, after that time, it continues to transact business as a corporation, it is a corporation *de facto*.⁴ Although, prior to the amendment of section 362 of the Civil Code in 1915, it was permissible to shorten the term of existence by amendment of the articles of incorporation,⁵ there is now no method of shortening the term to less than that provided in the original articles other than by voluntary dissolution in the manner provided by law.⁶

§ 62. **Extension of Corporate Existence.**—The legislature is empowered to prescribe or extend the term of existence of corporations, and, except as restricted by the constitution, its power in this regard is absolute.⁷ The constitution adopted in 1879 provided that “The legislature shall not extend any franchise or charter nor remit the forfeiture of any franchise or charter of any corpora-

See also *Haynes v. Backman*, 3 Cal. Unrep. 712, 31 Pac. 746, where one corporation was named as defendant while the judgment was rendered against another and it was held that the judgment was not irregular where the latter company appeared and filed an answer showing the identity of the two by reason of consolidation.

1. Civ. Code, § 290, subd. 4.

2. Civ. Code, § 354, subd. 1. See *supra*, § 47, subd. 4, as to term of existence.

3. See *infra*, § 639.

4. *First Nat. Bank v. Pennig*, 28 Cal. App. 267, 151 Pac. 1153.

5. *Tognazzini v. Jordan*, 165 Cal. 19, Ann. Cas. 1914C, 655, 130 Pac. 879 (term altered so that term would expire the day after filing the amendment with the secretary of state); *Nezik v. Cole*, 43 Cal. App. 130, 184 Pac. 523.

6. See *infra*, §§ 631-635, as to voluntary dissolution of corporations.

7. *Boca Mill Co. v. Curry*, 154 Cal. 326, 97 Pac. 1117.

tion now existing or which shall hereafter exist under the laws of this state.”⁸ Under this provision it was held that the provisions of section 401 of the Civil Code as amended in 1907⁹ were unconstitutional, although it was admitted that the provisions of the section as it stood prior to the amendment might still be in force.¹⁰ By a constitutional amendment adopted in 1908, apparently based upon the provisions of section 401 previously held invalid, the provisions of section 7 of article XII of the constitution were amended so as to make the original clause applicable to quasi-public corporations only, and by adding the following provisions:

“The term of existence of any other corporation now or hereafter existing under the laws of this state, may be extended at any time prior to the expiration of its corporate existence, for a period not exceeding fifty years from the date of such extension, by the vote or written consent of stockholders representing two-thirds of its capital stock or of two-thirds of the members thereof. A certificate of such vote or consent shall be signed and sworn to by the president and secretary, and by a majority of the directors of the corporation and filed and certified in the manner and upon payment of fees required by law for filing and certifying articles of incorporation, and thereupon the term of the corporation shall be extended for the period specified in such certificate, and such corporation shall thereafter pay all annual or other fees required by law to be paid by corporations.”¹¹

8. Const., art. XII, § 7 (original section).

9. Civil Code, § 401, prior to 1907, provided that a corporation formed for a period of less than fifty years might at any time prior to the expiration of its term extend the term to a period not exceeding fifty years from its formation; the amendment permitted the corporation by a two-thirds vote or assent of its stockholders at any time prior to the expiration of its

term of existence to extend such term to a period not exceeding fifty years from the date of such extension. The section as amended, although held unconstitutional, was never repealed by the legislature, but was finally amended by Stats. 1921, p. 132.

10. *Boca Mill Co. v. Curry*, 154 Cal. 326, 97 Pac. 1117.

11. See *People v. Pfister*, 57 Cal. 532 (as to filing of certificate of extension under former code pro-

The extension under this provision, if made at a meeting, must be at a meeting of stockholders or members, called by the directors especially for considering the subject. The certificate of extension bearing the corporate seal must be filed in the office of the secretary of state, whereupon the term of existence is extended for the period specified in the certificate; but a certified copy must be issued and transmitted for filing to the county clerk of the county in which the principal place of business was situated at the time of incorporation. Thereafter copies must be filed in every county where the corporation has or holds real property.¹²

Continuing Existence Under the Codes.

§ 63. Election to Continue Under Codes.—A corporation formed prior to the taking effect of the codes is permitted to continue its existence under their provisions upon making its election in the manner provided by law and filing a certificate of the proceedings in the office of the secretary of state. Thereafter its existence continues under the provisions of the code applicable thereto, and it possesses all the rights and powers, and is subject to all the obligations, restrictions, and limitations prescribed thereby. The secretary of state is required to transmit a certified copy of the certificate to the county clerk of the county in which the principal place of business was situated at the time of incorporation, for filing, and a similar copy must be filed by the corporation in every county in which it has or holds real property; and for failure to comply with such provision for filing, the corporation subjects itself to the penalties and liabilities provided in section

visions). See *infra*, § 712, as to Stats. 1921, p. 132, prescribing the fees for filing articles of incorporation. same penalties for noncompliance as under section 299 of the Civil Code.

12. Civ. Code, § 401, as amended Code. See *supra*, § 52.

299 of the Civil Code.¹³ As to corporations so electing to continue their existence, the former laws under which it was formed and existed and which were applicable to it were expressly repealed by section 288 of the Civil Code. Thus, where the term of existence has been extended by compliance with code provisions, at least that part of the prior act which limited the term is repealed. And in this connection the principal purpose of section 287 must have been to continue corporate existence in order that property, rights and privileges might be preserved by complying with code provisions as to extension of corporate existence.¹⁴ And having become a code corporation, the provisions of the code are applicable to it.¹⁵

§ 64. Corporations not Continuing Existence.—Under section 288 of the Civil Code, no corporation formed or existing before the code became operative is affected by its provisions in respect to corporations, unless such corporation elects to continue its existence under it as provided in section 287. The laws under which such corporations were formed and exist are applicable to them, but otherwise, are repealed.¹⁶ And since, under this code provision,

13. Civ. Code, § 287. See *supra*, § 52, as to penalties under section 299 of the Civil Code.

14. *People v. Auburn etc. Turnpike Co.*, 122 Cal. 335, 55 Pac. 10. See *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225, to the effect that the code section relating to extension of corporate existence was intended to apply to existing corporations. And see *Boca Mill Co. v. Curry*, 154 Cal. 326, 97 Pac. 1117, not deciding whether Civil Code, section 287, was inconsistent with article XII, section 7, of the constitution of 1879, but discussing the point. See *infra*, § 64, for wording of Civ. Code, § 288.

15. *People v. Pfister*, 57 Cal. 532.

16. See *supra*, § 63, as to election under section 287, Civil Code, to continue under the code.

As to pre-code corporations, the statutes under which they were formed were continued in force, the repeal relating only to corporations formed after the code went into effect; *Estate of Dol*, 182 Cal. 159, 187 Pac. 428 (holding that charitable corporation which had not elected to continue under the code has power to take gifts of real or personal property as permitted by the statute under which organized); *Estate of Eastman*, 6 Cal. 308.

prior incorporation acts were repealed, new corporations may not be formed under them. Such acts remained in force, so far as existing corporations were concerned, not only so far as necessary to sustain their existence, but to fix their character, define their powers, duties, obligations and liabilities, except in so far as these have been modified, altered or repealed by inconsistent code provisions.¹⁷ But where a pre-code corporation has not elected to continue its existence under the code, it is not bound by provisions of one of the sections of the code,¹⁸ such, for instance, as section 354 of the Civil Code defining corporate powers.¹⁹

De Facto Existence and Estoppel.

§ 65. In General.—Section 358 of the Civil Code, in the latter part thereof, provides:

17. *Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317. See *Market St. Ry. Co. v. Hellman*, 109 Cal. 571; 42 Pac. 225, contra, to the effect that in all matters relating to future conduct there is no reason why existing corporations should not be governed by the same laws as those formed subsequently to adoption of code, and holding section 473 of the Civil Code, relating to consolidation of railroad companies, as applicable to corporations whether formed before or after the codes. The court was of the opinion that laws which in no wise related to the formation or existence of the corporation were not saved by the code, and that the provisions of the Civil Code as to such other matters were therefore applicable.

The case of *Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317, however, stated that since the statute prior to the code was substantially the same as section 473, it

was immaterial in the *Hellman* case whether the power of the corporation to make a consolidation was exercised under the code or the prior statute, and that the question was, therefore, not necessary to the decision of that case. See *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418, in which the doctrine of *Market St. Ry. Co. v. Hellman*, was followed, and it was held that section 322 of the Civil Code applied to the stockholders of corporations formed or doing business in the state before or after the adoption of the codes. The provision for the stockholders' liability, however, appeared in the constitution itself. This case was not referred to in *Murphy v. Pacific Bank*, supra.

18. *Robinson v. Southern Pac. Co.*, 105 Cal. 526, 28 L. R. A. 773, 38 Pac. 94.

19. *Low v. California Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629.

"The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney-general, provided, however, as to any company claiming in good faith to be, and which has been doing business for ten consecutive years as a corporation, no such inquiry shall be made either by the state or by any person whatsoever."

Under the California system of incorporation through general laws, a corporation de jure is an artificial body created by operation of law upon the due execution, filing and certification of certain written instruments by persons desirous of incorporating and by certain public officers.²⁰ A corporation is recognized as de facto when a number of persons have organized and acted as such, and have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations.¹ But ultra vires acts may be challenged whether the corporation be one de facto or one de jure.² The same rule which recognizes officers de facto applies to corporations de facto.³ And it has been said that the rule as to de facto corporations would be no different if the constitution itself should prescribe the manner of incorporation, for even in such case, proof that the corporation was act-

20. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

1. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *Jaques v. Board of Supervisors*, 24 Cal. App. 381, 141 Pac. 404; *Barnes v. Board of Supervisors*, 13 Cal. App. 760, 110 Pac. 820; *Reclamation District No. 765 v. McPhee*, 13 Cal. App. 382, 109 Pac. 1106. And see cases cited *infra*, § 66.

Where a corporation is de facto, even though it does not become a

corporation de jure, it is nevertheless a legal entity; *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236. And it is to be regarded as a corporation duly formed; *People v. Leonard*, 106 Cal. 302, 39 Pac. 617.

2. *Boca etc. R. R. Co. v. Sierra Valleys R. R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

3. *Hamilton v. County of San Diego*, 108 Cal. 273, 41 Pac. 305.

See PUBLIC OFFICERS.

ing as such under legislative action would be sufficient evidence of right.⁴

§ 66. Elements of De Facto Corporation.—De facto corporate organizations are upheld upon grounds distinct from those upon which a de jure organization rests.⁵ Although an attempt to incorporate is defective so that the corporation is not de jure, the exercise of corporate powers creates a de facto corporation.⁶ But if there is no attempt to exercise corporate functions, a defective incorporating instrument is not evidence of a corporation in esse.⁷ Under section 358 of the Civil Code, the company must be “doing business as such” and “claiming in good faith to be a corporation.”⁸ The requisites to constitute a corporation de facto are said to be three in number: (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise.⁹ It is not necessary that some particular period should elapse in order to show a de facto existence. Such existence depends rather upon what has been done

4. *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531, see, also, *Rose's U. S. Notes*.

5. *Reclamation District No. 765 v. McPhee*, 13 Cal. App. 382, 109 Pac. 1106.

6. *McCann v. Children's Home Society*, 176 Cal. 359, 168 Pac. 355.

Where a foreign corporation is admitted to exist, a claim that the corporation is but a domestic de facto corporation is without foundation; *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

7. *McCallion v. Hibernia Sav. etc. Soc.*, 70 Cal. 163, 12 Pac. 114; *People v. Selfridge*, 52 Cal. 331; *Harris*

v. McGregor, 29 Cal. 124; *Mokelumne Hill etc. Min. Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658.

The public has no interest in the matter, where individuals claiming to be a corporation do not attempt to act as such; *People v. Sutter St. Ry. Co.*, 117 Cal. 604, 49 Pac. 736.

8. *Vallejo etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

9. *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531, see, also, *Rose's U. S. Notes*; *Jaques v. Board of Supervisors*, 24 Cal. App. 381, 141 Pac. 404.

by virtue of the organization than upon the length of time which may elapse after its inception.¹⁰

§ 67. Law Authorizing Existence.—Where there is no law under which corporations similar to the one under consideration may be organized at all, there can be no corporation *de facto*. Thus, if a law authorizing organization is unconstitutional, there can be no *de facto* existence under it,¹¹ and in such case an attempted organization is irregular and void.¹² So, where the law under which a banking corporation has been formed and exists does not authorize the transaction of any business but a savings business, the corporation cannot be *de facto* a commercial bank.¹³

§ 68. Organization in Good Faith.—In order to resist collateral attack on the validity of its existence, an organization must show that it claims in good faith to be a corporation under the laws of the state.¹⁴ And there must be an organization under color of title;¹⁵ but an attempt to

10. Reclamation District No. 765 v. McPhee, 13 Cal. App. 382, 109 Pac. 1106.

11. *People v. Reclamation District No. 551*, 117 Cal. 114, 48 Pac. 1016; *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562. See *San Francisco v. Spring Valley Water Works*, 48 Cal. 493, where the point was raised in argument and the court held the law unconstitutional and that it conferred no powers, although not discussing the question of *de facto* corporations. And see *Estate of Dol*, 182 Cal. 159, 187 Pac. 428, holding that the character of a corporation organized under the act of 1850 (Stats. 1850, p. 373, concerning corporations), either as a *de facto* corporation or as a voluntary association, assuming that the act did not authorize

the formation of any corporation other than a charitable one, is to be determined by the terms of its articles of incorporation and its by-laws and its conduct and acts in pursuance thereof.

12. *People v. Levee District No. 6*, 131 Cal. 30, 63 Pac. 676.

13. *Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317 (where the court under the facts assumed that the statute did not authorize transaction of anything but savings business, but deemed it unnecessary to decide the question as to whether the bank should be held to be a commercial or savings bank). See *BANKS*, vol. 4, p. 92.

14. Civ. Code, § 358.

15. *Barnes v. Board of Supervisors*, 13 Cal. App. 760, 110 Pac. 820.

organize which utterly fails cannot give legal status as a de facto corporation.¹⁶ And if no corporate acts are performed by the pretended corporation, which has been defectively incorporated, there can be no de facto corporation.¹⁷ And no valid trust can be created for members of a corporation which has no legal existence either de jure or de facto.¹⁸ The good faith of the incorporators in forming the corporation, that is, their purpose in organizing, cannot be called into question collaterally,¹⁹ although of course their organizing in good faith can be, as it is a necessary prerequisite to the de facto existence. Just how much business must be done by a corporation assuming de facto powers, or what facts showing good faith are necessary to constitute a de facto organization, can be determined by no fixed rule.²⁰ But if a company has in form a charter authorizing it to act as a body corporate and is in fact in the exercise of corporate powers, it is a corpora-

16. *People v. La Rue*, 67 Cal. 526, 8 Pac. 84; *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354.

Section 358 evidently refers to a corporation which has not failed to organize and which does exercise corporate powers, and thus becomes a corporation de facto; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

17. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386 (where no corporate acts of any character were performed); *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368 (where directors named in articles refused to meet or act; no stock ever issued; no by-laws ever passed; no seal adopted; no persons ever meet in corporate body assembled; no officers ever elected; no persons ever appointed to represent the asserted corporation; no journal or record of proceedings kept, it was held that the pre-

tended corporation was never in a position to exercise or pretend to exercise corporate powers); *People v. Volcano etc. Road Co.*, 100 Cal. 87, 34 Pac. 522; *McCallion v. Hibernia Sav. etc. Soc.*, 70 Cal. 163 12 Pac. 114.

A contract purporting to transfer property to a corporation having no legal existence passes no title at all, the title remaining in the transferor; *Copeland v. Fairview Land etc. Co.*, 165 Cal. 148, 131 Pac. 119; *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386. See *infra*, § 563, as to presumption of corporate power to take property.

18. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

19. *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27.

20. *People v. Reclamation District No. 556*, 130 Cal. 607, 63 Pac. 27.

tion de facto.¹ And where a pretended corporation is recognized as such in the community, and its records show that it was so acting and in all its dealings was styled as a corporation and where it pursued corporate forms of action and held corporate meetings, this is sufficient to support a finding that it was a corporation acting in good faith.²

§ 69. Powers of De Facto Corporation.—A de facto corporation may legally perform every act which it could perform were it de jure, for, as against all the world except the paramount authority, it occupies the position of a valid corporation.³ A de facto corporation, therefore, is entitled to maintain actions in its corporate name.⁴ But a corporation cannot act in the dual capacity as both de jure and de facto.⁵

It is sometimes held, however, in the absence of an estoppel or admission by the opposite party, that the right of eminent domain cannot be exercised by a de facto corporation, and that this is one of the exceptions to the general rule as to corporations de facto.⁶ But in California it is the rule that, so far as an attack upon the corporate exist-

1. *Dean v. Davis*, 51 Cal. 406.

2. *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76.

3. *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. 60; *People v. La Rue*, 67 Cal. 526, 8 Pac. 84; *People's Ditch Co. v. Seventy-Six Land & W. Co.*, 5 Cal. Unrep. 292, 44 Pac. 176; *Miller v. Perris Irr. Dist.*, 99 Fed. 143. And see cases cited *infra*.

4. *First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. 60; *Pacific Bank v. De Ro*, 37 Cal. 538; *Creditors' Union v. Lundy*, 16 Cal. App.

567, 117 Pac. 624. And see cases *infra*, § 70, on collateral attack.

5. *Boca etc. R. R. Co. v. Sierra Valleys R. R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

6. *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531, see, also, *Rose's U. S. Notes. See Spring Valley Water Works v. San Francisco*, 22 Cal. 434, where apparently there had been a substantial compliance sufficient for de jure existence; and *Boca etc. R. R. Co. v. Sierra Valleys R. R. Co.*, 2 Cal. App. 546, 84 Pac. 298, where an opinion on the rule was not expressed, although the point was raised.

ence is concerned, condemnation proceedings are collateral in their nature;⁷ and there is no right in such proceeding to attack the existence of a corporation shown to be de facto. The question can be raised only in a direct proceeding in the nature of quo warranto.⁸

§ 70. Freedom from Collateral Attack.—As stated in section 358 of the Civil Code, the due incorporation of a company claiming in good faith to be a corporation and doing business as such, or its right to exercise corporate powers, cannot be inquired into collaterally in any private suit to which such a de facto corporation is a party; such inquiry can be made only at the suit of the state in a direct proceeding for that purpose.⁹ Even as against the

7. *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 679, 115 Pac. 1091, 1100. See **EMINENT DOMAIN**.

8. *Vallejo etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238; *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 679, 115 Pac. 1091, 1100; *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27. See *infra*, § 647 et seq., as to quo warranto proceedings.

9. *McCann v. Children's Home Soc.*, 176 Cal. 359, 168 Pac. 355; *Vallejo etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238; *McPhee v. Reclamation District No. 765*, 161 Cal. 566, 119 Pac. 1077; *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140; *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222; *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *San Diego Gas Co. v. Frame*, 137 Cal. 441, 70 Pac. 295; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86; *Los Angeles Holiness Band v. Spires*, 126 Cal. 541, 58 Pac. 1049; *Hamilton v.*

County of San Diego, 108 Cal. 273, 41 Pac. 305; *People v. Leonard*, 106 Cal. 302, 39 Pac. 617; *Lundy v. Delmas*, 104 Cal. 655, 26 L. R. A. 651, 38 Pac. 445; *Reclamation District No. 542 v. Turner*, 104 Cal. 334, 37 Pac. 1038; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514, 777; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *Swamp Land District No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866; *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *Reclamation District No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779; *First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. 60; *Golden Gate Mill etc. Co. v. Joshua Hendy Machine Wks.*, 82 Cal. 184, 23 Pac. 45; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Oakland Gas Light Co. v. Dameron*, 67 Cal. 663, 8 Pac. 595; *People v. La Rue*, 67 Cal. 526, 8 Pac. 84; *Weaverville etc. Road Co. v. Board of Supervisors*, 64 Cal. 69, 28 Pac. 496; *Hoke v. Perdue*, 62 Cal. 545; *Bakersfield etc. Hall Assn. v.*

state, except in direct proceedings to arrest usurpation of corporate power, the acts of a de facto corporation are to be treated as efficacious.¹⁰ And so, a mere intruder into or trespasser upon the property of a corporation de facto cannot inquire into its existence as a corporation.¹¹ It cannot be shown collaterally, even, that the charter was procured through fraud.¹² And the state itself may justly be precluded on principles of estoppel from raising any such objection where there has been long acquiescence and recognition.¹³ But an estoppel is not created against the

Chester, 55 Cal. 98; Dean v. Davis, 51 Cal. 406; People's Ditch Co. v. Seventy-Six Land & Water Co., 5 Cal. Unrep. 292, 44 Pac. 176; Gray v. Cardiff Irr. Dist., 34 Cal. App. Dec. 457, 197 Pac. 389; First Nat. Bank v. Pennig, 28 Cal. App. 267, 151 Pac. 1153; Jaques v. Board Supervisors, 24 Cal. App. 381, 141 Pac. 404; Western Union Tel. Co. v. Superior Court, 15 Cal. App. 679, 115 Pac. 1091, 1100; Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505; Barnes v. Board of Supervisors, 13 Cal. App. 760, 110 Pac. 820; Reclamation District No. 765 v. McPhee, 13 Cal. App. 382, 109 Pac. 1106; Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531, see, also, Rose's U. S. Notes; Herring v. Modesto Irr. Dist., 95 Fed. 705; Miller v. Perris Irr. Dist., 85 Fed. 693. See the following cases stating that any material omission of a statutory requirement in the incorporation is fatal to the existence of the corporation and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question, but in which cases there was

no de facto corporation. Wall v. Mines, 130 Cal. 27, 62 Pac. 386; Mokelumne Hill etc. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

The same rule obtained under the statutes prior to the adoption of the code provision: Stockton etc. Road Co. v. Stockton etc. R. Co., 45 Cal. 680; Pacific Bank v. De Ro, 37 Cal. 538; Oroville etc. R. Co. v. Plumas County, 37 Cal. 354; Rondell v. Fay, 32 Cal. 354; Dannebroge etc. Min. Co. v. Allment, 26 Cal. 286; Spring Valley Water Works v. San Francisco, 22 Cal. 434; Mokelumne Hill etc. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

10. People v. La Rue, 67 Cal. 526, 8 Pac. 84; Miller v. Perris Irr. Dist., 99 Fed. 143.

11. Golden Gate Mill etc. Co. v. Joshua Hendy Machine Wks., 82 Cal. 184, 23 Pac. 45; Stockton etc. Road Co. v. Stockton etc. R. Co., 45 Cal. 680 (under Corporation Act of 1862, § 6, Stats. 1862, p. 110).

12. Dean v. Davis, 51 Cal. 406. See Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27 (as to good faith in acquiring corporate charter).

13. Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 46 L. Ed. 773, 22

state by reason of its inaction in the matter for many years, for the continued exercise of the franchise is a continued usurpation upon which a new cause of action in favor of the state is ever arising.¹⁴ But if it specifically provided that as to any company claiming in good faith to be, and which has been doing business for ten consecutive years as such, no inquiry can be made as to due incorporation either by the state or by any person whatsoever.¹⁵ The statute was not intended as a curative act merely, but was designed to have a prospective operation as well and was intended as a rule for future corporations.¹⁶

§ 71. Right to Question Existence De Facto.—In order to have capacity to sue, a corporation must be either de jure or de facto,¹⁷ although it is necessary to prove only an existence de facto to establish such capacity.¹⁸ The statute providing that the question of due incorporation of a company claiming in good faith to be a corporation and doing business as such cannot be inquired into collaterally does not go to the extent of precluding a private person from denying the existence either de jure or de facto of an alleged corporation.¹⁹ It does not mean that whenever a pleading is signed and filed in an action by an attorney in which some named company for whom he appears is averred to be a corporation, that all the world except the state is at once estopped from denying the existence of such corporation.²⁰ An averment of the existence of a de facto corporation is as issuable as an aver-

Sup. Ct. Rep. 531, see, also, Rose's U. S. Notes.

14. *People v. Reclamation District No. 136*, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

15. Civ. Code, § 358.

16. *Pacific Bank v. De Ro*, 37 Cal. 538.

17. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354.

18. *Pacific Bank v. De Ro*, 37 Cal. 538.

19. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354.

20. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *People v. Volcano etc. Road Co.*, 100 Cal. 87, 34 Pac. 522; *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354.

ment of the existence of a corporation de jure.¹ It results from the logic of pleading that the allegation that a party is a corporation may be denied by the opposite party.² And if a pretended corporation has no de facto existence, its right to exist may be collaterally attacked.³

§ 72. Estoppel to Deny Corporate Existence.—A person who deals with a company as a corporation existing in fact and having power to enter into the particular contract and who has received the benefit of that contract, is, upon well-settled principles of equity, estopped to deny as against the corporation that it has been legally organized.⁴ The distinction seems to be this: In actions not founded upon contract between the parties, the existence of the alleged corporation, if put in issue, must be proved; but when one has contracted with an alleged corporation and is sued by it for failure to perform his contract, he cannot be heard to say that it had no existence and for such reason that no contract was made.⁵ Thus, although it be held that a

1. *People v. Reclamation District No. 556*, 130 Cal. 607, 63 Pac. 27; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

2. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354. See *infra*, § 75.

3. *McPhee v. Reclamation District No. 765*, 161 Cal. 566, 119 Pac. 1077; *Reclamation District No. 765 v. McPhee*, 13 Cal. App. 382, 109 Pac. 1106.

4. *McCann v. Children's Home Soc.*, 176 Cal. 359, 168 Pac. 355 (deed describing grantee as corporation duly organized); *California Fruit Exchange v. Buck*, 163 Cal. 223, 124 Pac. 824 (under a mortgage); *California Cured Fruit Assn. v. Stelling*, 141 Cal. 713, 75 Pac. 320; *Raphael Weill & Co. v. Crittenden*, 139 Cal. 488, 73 Pac. 238;

Camp v. Land, 122 Cal. 167, 54 Pac. 839; *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337 (under a mortgage); *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *Grangers' Business Assn. v. Clark*, 67 Cal. 634, 8 Pac. 445; *Argenti v. City of San Francisco*, 16 Cal. 255; *Tustin-Fruit Assn. v. Earl Fruit Co.*, 6 Cal. Unrep. 37, 53 Pac. 693; *J. I. Case Threshing Machine Co. v. Copren Bros.*, 30 Cal. App. Dec. 991, 187 Pac. 772; *Francis v. Western Screen Co.*, 22 Cal. App. 32, 133 Pac. 327. See *Sierra Land etc. Co. v. Bricker*, 3 Cal. App. 190, 85 Pac. 665 (where there was also other evidence of corporate existence).

5. *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

corporation de facto cannot exercise the right of eminent domain, nevertheless the opposite party may be precluded from setting up the defense by matters in pais amounting to an estoppel or admission.⁶ Likewise a company which permits itself to be held out as a corporation is estopped to deny the legality of its organization.⁷ And in an action against them, unfaithful directors are estopped to urge the irregularity of a certificate of incorporation which they themselves signed.⁸

Pleading.

§ 73. Averment of Incorporation.—A corporation must exist either de jure or de facto, or it has no legal capacity to sue or be sued, nor any capacity of any kind.⁹ Although there are decisions indicating that it is an indispensable allegation, in an action brought by a corporation, that the plaintiff is a corporation,¹⁰ and that where suit is

6. *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531, see, also, *Rose's U. S. Notes*. See as to right of de facto corporation to exercise right of eminent domain, *supra*, § 69.

7. *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 183 Cal. 709, 192 Pac. 526; *Marx v. Raley & Co.*, 6 Cal. App. 479, 92 Pac. 519 (holding that where the defendant represents in its letters that it is a corporation, this is sufficient to support a finding of the corporate character).

See note, 5 A. L. R. 1580, as to what names import corporation within rule that one contracting with body described by corporate name is estopped to deny its corporate existence.

Where a foreign company conducts business in California, assuming to be a corporation, and thereby inducing transactions with

it, it is not permitted to deny its corporate existence; *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 183 Cal. 709, 192 Pac. 526.

8. *Parrott v. Byers*, 40 Cal. 614. See, however, *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562, holding that where there is no corporation de jure or de facto, there can be no estoppel, for there is no organized body or person or persons against whom to urge a waiver or plead an estoppel.

9. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354.

10. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354; *Consolidated Concessions Co. v. McConnell*, 40 Cal. App. 443, 180 Pac. 842 (where it was held that a complaint which failed to aver that the corporation continued to be such for or at any time after its incorporation—although that fact is averred—or

brought by a party in a name indicating that plaintiff is not a natural person, but a company of some kind, there must be an allegation of corporate existence in every count of the complaint, as necessary to the statement of the cause of action,¹¹ and that it must be shown where or under what law it is incorporated, so that the court may determine where jurisdiction exists,¹² nevertheless, the more authoritative rule seems to be that an allegation of the corporate existence of the plaintiff is not necessary to the statement of a cause of action,¹³ inasmuch as the defect, if any, is one that goes to the point of the legal capacity to sue and not to the sufficiency of the facts stated to consti-

that it was such at the time of any transactions referred to in the complaint or at the time of the institution of suit, was not sufficient).

11. *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303 (overruled on another point in 105 Cal. 576, 38 Pac. 905, and the holding on the point stated in the text criticised and pronounced obiter in *Los Angeles R. Co. v. Davis*, 146 Cal. 179, 106 Am. St. Rep. 20, 79 Pac. 865. See *infra*, this section); *Loup v. California etc. R. Co.*, 63 Cal. 97 (criticised in *Los Angeles R. Co. v. Davis*, *supra*). See *contra*, *Waldeck Co. v. Pacific Coast S. S. Co.*, 2 Cal. App. 167, 83 Pac. 158. And see *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510, holding that in an action to quiet title, it is not necessary to allege that a defendant corporation under whom plaintiff claims no right is a corporation.

12. *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303 (see criticism of this case in the *Davis* case, *infra*). But see *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880, stating that it has never been held that an allegation

of the corporate existence of a defendant corporation is essential to the jurisdiction of the court over either the person of a defendant or the subject matter of the action. And see *Los Angeles R. Co. v. Davis* for a criticism of the statements, *contra*, in *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303.

13. *Los Angeles Ry. Co. v. Davis*, 146 Cal. 179, 106 Am. St. Rep. 20, 79 Pac. 865 (distinguishing *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354, on the ground that the sufficiency of the complaint was not involved, and also distinguishing *Loup v. California etc. R. Co.*, 63 Cal. 97, and *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303, on the ground that the statements therein contained were not necessary to the decisions). It will be noted, however, that in the two last-named cases the allegations were of the defendant's corporate existence, and that a distinction might easily be made, but in view of the decision in *Crouch v. H. L. Miller & Co.* *infra*, this distinction is probably foreclosed.

tute a cause of action.¹⁴ An allegation that the plaintiff is a corporation under the laws of California is sufficient to establish the right to sue.¹⁵

§ 74. Taking Advantage of Corporate Incapacity.—The objection that the incorporation of the plaintiff is not averred in the complaint is not raised by a general demurrer, as the point that plaintiff is not a corporation goes only to its capacity to maintain an action, and not to the sufficiency of the facts averred to constitute the alleged cause of action,¹⁶ and therefore may be raised only by special demurrer to the complaint.¹⁷ Even such a special demurrer would be bad, however, where it does not appear on the face of the complaint that the plaintiff has not capacity to sue. If the complaint does not show that plaintiff is not a corporation, the objection can only be taken advantage of by way of answer.¹⁸ The issue as to incorporation cannot be raised by a general denial of all allegations of the complaint,¹⁹ for to say that a plaintiff suing as a corporation is not a corporation is to say that it

14. *Los Angeles R. Co. v. Davis*, 146 Cal. 179, 106 Am. St. Rep. 20, 79 Pac. 865; *Swamp & Overflowed Land Dist. v. Feck*, 60 Cal. 403. See *infra*, § 74; and generally, see PLEADING.

15. *Cal etc. Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511. See *People v. Schwartz*, 32 Cal. 160, holding in a criminal proceeding that an allegation that a company is "legally established" is not equivalent to an averment that it is a corporation, but on the contrary is no averment of a fact at all and tenders no issue. As to proof of corporate existence in criminal proceedings, see *infra*, § 78.

16. *Los Angeles Ry. Co. v. Davis*, 146 Cal. 179, 106 Am. St. Rep. 20,

79 Pac. 865; *Swamp & Overflowed Land Dist. No. 110 v. Feck*, 60 Cal. 403; *Mora v. Le Roy*, 58 Cal. 8 (sole corporation).

17. *Los Angeles Ry. Co. v. Davis*, 146 Cal. 179, 106 Am. St. Rep. 20, 79 Pac. 865.

18. *Los Angeles Ry. Co. v. Davis*, 146 Cal. 179, 106 Am. St. Rep. 20, 79 Pac. 865; *Swamp & Overflowed Land Dist. No. 110 v. Feck*, 60 Cal. 403. See *Consolidated Concessions Co. v. McConnell*, 40 Cal. App. 443, 180 Pac. 842, where demurrer was sustained, but where there were other grounds also for sustaining the demurrer.

19. *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337; *California etc. Nav. Co. v. Wright*, 8 Cal. 585.

has not legal capacity to sue, and this defense must be specially pleaded.²⁰ If the objection to the capacity of the plaintiff to sue is not taken by demurrer or answer, the objection is waived and the corporate existence cannot be inquired into in a collateral attack upon the judgment.¹

§ 75. Denial of Corporate Existence.—Where it is alleged that the corporation is one organized and existing under and by virtue of the laws of the state of California, a denial of the averment based on want of information and belief is not a sufficient denial and amounts to an admission of the alleged fact.² Such a denial is evasive and raises no issue,³ and there is no error in striking it out,⁴ for where matters of public record are within reach of the defendant, they cannot be denied on the ground that he has no information or belief concerning them.⁵ Likewise, a denial on information and belief that a foreign corporation has complied with the law for doing business in the state is an insufficient denial of corporate existence,⁶ and such denial is an admission, since the alleged fact may be ascertained from inspection of a public record.⁷

Proof.

§ 76. In General.—Whenever corporate existence is properly put in issue, it must be proved,⁸ although of

20. *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337.

1. *McFall v. Buckeye etc. Warehouse Assn.*, 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

2. *Rogers Brothers Co. v. Beck*, 43 Cal. App. 110, 184 Pac. 515. See cases cited *infra*.

3. *Brinkley-Douglas Fruit Co. v. Silman*, 33 Cal. App. 643, 166 Pac. 371.

4. *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130.

5. *Art Metal Const. Co. v. A. F. Anderson Co.*, 182 Cal. 29, 186 Pac. 776; *Brinkley-Douglas Fruit Co. v. Silman*, 33 Cal. App. 643, 166 Pac. 371; *William Wilson Co. v. Trainor*, 27 Cal. App. 43, 148 Pac. 954.

6. *Lincoln County Bank v. Fetterman*, 170 Cal. 357, 149 Pac. 811.

7. *Art Metal Const. Co. v. A. F. Anderson Co.*, 182 Cal. 29, 186 Pac. 776.

8. *Jones v. Evans*, 6 Cal. App. 88, 91 Pac. 532. See *Curran v. Ken-*

course, where a perfect cause of action is set out without regard to the allegation concerning the corporate capacity of a defendant corporation, it is immaterial that no evidence was introduced on that point. So, also, where a deed is offered in evidence and it is claimed that the grantor is not a corporation, that objection should be made when the evidence is offered.⁹ One deraigning title through a corporation must prove the legal existence of the corporation. The mere recitals in the deed that the grantor is a corporation do not prove such corporate existence as against one claiming the property through another source of title.^{9a} And where it is claimed that the judge is disqualified by reason of relationship to a director in the company, an objection that a showing was not made as to the fact of its being a corporation should be made at the time of the motion for change of venue.¹⁰

The general rule is that the existence of a corporation may be proved by producing its charter and showing acts of user under it; but this of course has no application to a corporation formed under general laws requiring certain acts to be performed before the corporation can be considered in esse.¹¹ The existence of a corporation under general laws is proved by its articles of incorporation executed and filed in accordance with the statute,¹² but there must be substantial compliance with the law before they are admissible,¹³ unless a corporation de facto is shown, in which case they are admissible without error, although

nedy, 89 Cal. 98, 26 Pac. 641 (a finding that the company was a corporation formed by special act of Congress is a sufficient finding as to whether the corporation was incorporated or had an existence). And see cases cited *infra*.

9. Colton Land & W. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

9a. Sonoma County Water Co. v. Lynch, 50 Cal. 503.

10. Lynip v. Alturas School Dist., 29 Cal. App. 158, 155 Pac. 109.

11. Mokelumne Hill etc. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

12. Spring Valley Water Works v. San Francisco, 22 Cal. 434.

13. Harris v. McGregor, 29 Cal. 124; Mokelumne Hill etc. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

defective.¹⁴ The articles or other incorporation papers, however, are the best or primary evidence of the act of incorporation,¹⁵ and this is the proof contemplated by section 297 of the Civil Code.¹⁶ The certificate of the secretary of state of the filing in his office of a certified copy of the articles of incorporation is evidence to prove the corporate existence.¹⁷

§ 77. Proof by Parol.—Corporate existence may be proved by parol.¹⁸ And when collaterally assailed, it is sufficient to prove that a corporation has a de facto existence.¹⁹ The testimony of an officer of the corporation that the plaintiff is a corporation may be sufficient proof thereof.²⁰ Thus where a witness speaks of the plaintiff as a corporation and of himself as a corporator and says that he was president during a considerable part of the time since the organization; his testimony tends to show a corporation, since it could not be true if the plaintiff never became a corporation de jure or de facto.²¹

14. *Rondell v. Fay*, 32 Cal. 354; *Dannebroge etc. Min. Co. v. Allment*, 26 Cal. 286.

15. *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22; *People v. Hagar*, 52 Cal. 171. See supra, § 49, as to articles as evidence.

16. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454.

17. *Brinkley-Douglas Fruit Co. v. Silman*, 33 Cal. App. 643, 166 Pac. 371 (under the law prior to the amendment of 1921). See supra, § 50; *Creditors' Union v. Lundy*, 16 Cal. App. 567, 117 Pac. 624 (stating that such certificate is the best evidence of the incorporation, but that if it is lost or destroyed, secondary evidence of its contents by

copy or recital of its contents in some authentic document or by the recollection of a witness is admissible).

18. *Brinkley-Douglas Fruit Co. v. Silman*, 33 Cal. App. 643, 166 Pac. 371.

19. *Oakland etc. Light Co. v. Dameron*, 67 Cal. 663, 8 Pac. 595; *Rondell v. Fay*, 32 Cal. 354; *Brinkley-Douglas Fruit Co. v. Silman*, 33 Cal. App. 643, 166 Pac. 371. See, also, cases cited in §§ 70, 71, supra, as to de facto existence.

20. *Goldberg, Bowen & Co. v. Dimick*, 169 Cal. 187, 146 Pac. 672; *Camp v. Land*, 122 Cal. 167, 54 Pac. 839; *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

21. *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

§ 78. Proof in Criminal Proceedings.—When, under an indictment in a criminal proceeding, the injured person is described as an incorporated company and it is material to prove this, the incorporation of the company may be proved by general reputation.¹ In such cases, there is no presumption that there is better evidence in the possession of the party offering it which he withholds. Then again, it has been argued, the defendant is entitled to a speedy trial and the ends of justice would be entirely defeated if such evidence were not admissible.² It is sufficient for the prosecution to show a corporation *de facto*,³ and this may be shown by parol.⁴ But it is a fact to be proved like character, by reputation, and not by direct statement of the witness, hence it is technically erroneous to allow a witness to testify that the company is a corporation.⁵

§ 79. Proof by Admissions.—Corporate existence may be proved by admissions of persons dealing with the corporation. Thus, where a note is attached to a complaint

1. *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Ah Sam*, 41 Cal. 645.

2. *People v. Ah Sam*, 41 Cal. 645 (in which it is said that the fact that bills are forged on a bank purporting to be incorporated raises the presumption that it is so, being a sort of an admission on the part of the wrongdoer of the character of the person against whom the crime is committed, and that proof by reputation in such matters is not very liable to lead to error).

3. *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Leonard*, 106 Cal. 302, 39 Pac. 617; *People v. Barrie*, 49 Cal. 342; *People v. Schwartz*, 32 Cal. 160; *People v.*

Hughes, 29 Cal. 257 (holding that it is not necessary to prove the incorporation by production of the corporate charter and showing a compliance with the laws of the state); *People v. Frank*, 28 Cal. 507.

4. *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Barrie*, 49 Cal. 342; *People v. Hughes*, 29 Cal. 257; *People v. Morley*, 8 Cal. App. 372, 97 Pac. 84. See also *supra*, § 77.

5. *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581. See *People v. Morley*, 8 Cal. App. 372, 97 Pac. 84, *contra*, but where a policy had been issued to defendant which on its face stated that the company was incorporated.

as part of it, which note was written on the billhead of the payee where the concern name is expressly referred to as "incorporated," evidence is thereby furnished of the fact.⁶ And a written receipt of money by which it appears that the defendants contracted with the plaintiff in its corporate name and received the money is competent evidence of the due incorporation.⁷ So, also, where a patent recites that a company is a corporation existing under the laws of the state, this, in the absence of countervailing circumstances, shows that it had capacity to take the property;⁸ and where a patent established the fact that the company was a corporation, its deed is proof of the existence of the corporation which makes it.⁹ By offering to surrender to the corporation his stock to effect a deal between it and another corporation, a person recognizes the existence of the corporation.¹⁰

§ 80. Admissions by Pleadings.—Where the complaint avers and the answer admits that a company is a corporation, this is a conclusive admission, which cannot be controverted by the evidence or the findings,¹¹ and the

6. Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 Pac. 951.

7. Sierra Land etc. Co. v. Bricker, 3 Cal. App. 190, 85 Pac. 665.

8. Southern Pac. R. Co. v. Purcell, 77 Cal. 69, 18 Pac. 886.

9. Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901.

10. Sullivan v. Triunfo etc. Min. Co., 39 Cal. 459.

11. McKee v. Title Ins. etc. Co., 159 Cal. 206, 113 Pac. 140; Wall v. Mines, 130 Cal. 27, 62 Pac. 386 (as to admission in answer to intervention); Waldeck & Co. v. Pacific Coast S. S. Co., 2 Cal. App. 167, 83 Pac. 158 (where the defendant admits it is a corporation but denies that it is a corporation

of the state alleged in the complaint, a finding merely that it is a corporation and no finding as to the state of incorporation is sufficient).

The defendant cannot show that a plaintiff corporation failed to comply with the law in its organization; California Raisin Growers' Assn. v. Abbott, 160 Cal. 601, 117 Pac. 767. See Smith v. Sinbad Development Co., 15 Cal. App. 166, 113 Pac. 701 (where it is admitted in pleadings that the corporation was organized, it must be assumed that if there are but two incorporators, that number was sufficient under the law of the state of incorporation).

admission is not affected by a finding that all the allegations of the answer are untrue.¹² Likewise, the same rule applies where there is a failure to deny corporate existence,¹³ or where there is a positive averment by the defendant that the plaintiff is a corporation,¹⁴ or by the plaintiff that the defendant is a corporation, and no finding in that regard is then necessary.^{14a} The admission by such positive averment is a waiver of the proof contemplated by section 297 of the Civil Code to the effect that the articles of incorporation must be received as *prima facie* proof of the facts therein stated.¹⁵ In quo warranto proceedings, it has been held that by making the corporation a party, it is admitted that it once had an existence.¹⁶ But in such proceedings, although the corporate character of the defendant is admitted in the pleadings, the people are not bound by the admission where the evidence shows beyond doubt that there is no defendant.¹⁷ Likewise, so far as a dissolved or dead corporation is concerned, there can be no admission or estoppel.¹⁸ And a party is not estopped by his allegations in another action as to existence of a corporation, where the parties and issues in the present action are different.¹⁹

12. *Francis v. Western Screen Co.*, 22 Cal. App. 32, 133 Pac. 327.

13. *Drew v. Superior Court*, 31 Cal. App. Dec. 1099, 190 Pac. 374.

In such a case a finding against corporate existence is not only a finding against such admission, but also without any issue presented upon which to make it; *Moynihan v. Drobaz*, 124 Cal. 212, 71 Am. St. Rep. 46, 56 Pac. 1026.

14. *Bank of Lassen County v. Sherer*, 108 Cal. 513, 41 Pac. 415.

14a. *Holmes v. Salamanca Gold Min. etc. Co.*, 5 Cal. App. 659, 91 Pac. 160.

15. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454. See *supra*, § 49.

16. *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

17. *People v. Volcano etc. Road Co.*, 100 Cal. 87, 34 Pac. 522.

18. *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335. See *infra*, §§ 628-630.

19. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

§ 81. Foreign Corporations.—While it has been said that certain earlier authority is to the effect that in all cases where it is material to prove a foreign corporation, it can be done only in the way in which any foreign law or statute is proven, and that this is the rule in civil cases where the fact of legal existence is in issue, it has been held that in criminal prosecutions a different rule prevails.²⁰ Where, however, it is proved that a contract between the parties recited that the plaintiff was a corporation under a certain name, and that judgment was recovered by such foreign corporation in that name in another state, this is sufficient proof of its corporate capacity and of the fact that it is operating under the name given.¹ The fact of existence of a foreign corporation may, of course, be admitted by the pleadings,² or by other papers in the case.³

§ 82. Presumptions.—In general, proof of a company name raises no presumption that such company is incorporated,⁴ and no presumption arises therefrom that it is incorporated under the laws of California.⁵ But where, in a mortgage, there are recitals that a deed is subject to the claim of an organization with a corporate name, it has been held that the name imports that there is a corporation and furnishes prima facie evidence of the corporate character, upon the theory that the acceptance of the deed is an

20. *People v. Ah Sam*, 41 Cal. 645 (citing authorities to the various rules).

1. *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238. See *Tropical Inv. Co. v. Brown*, 30 Cal. App. Dec. 1013, 187 Pac. 133, holding that where it is alleged that the plaintiff was incorporated under the laws of California, and it appears at the trial that it was incorporated under the laws of another state, this variance

was too trivial to warrant a reversal of judgment.

2. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

3. *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 183 Cal. 709, 192 Pac. 526 (admission in an affidavit to support a motion to quash service).

4. *Briggs v. McCullough*, 36 Cal. 542; *Maier Packing Co. v. Frey*, 5 Cal. App. 80, 89 Pac. 875.

5. *Briggs v. McCullough*, 36 Cal. 542.

admission that it is a corporation.⁶ Also, where corporate existence is shown to prevail at a previous time, that condition is presumed to continue until the contrary is shown.⁷ The presumption that actual duty has been regularly performed will not dispense with proof that the secretary of state has issued the certificate of incorporation and of its contents.⁸

IV. NAME, SEAL, RESIDENCE OR PLACE OF BUSINESS.

Name.

§ 83. **In General.**—In forming corporations under general laws the name is not given by the legislature, but by the corporators; it is only in the case of corporations organized under special charters that the name is given by the legislature.⁹ One of the powers expressly conferred on a corporation is that of succession by its corporate name,¹⁰ and it is a very ancient rule that a corporation must sue and be sued by its corporate name. This is one of the powers and capacities necessarily and inseparably incident to every corporation, for a corporation, like a person, is recognized in law only by its name.¹¹ The incorporation of a company will not be presumed, however, merely from its name,¹² although if land is conveyed to it in a corporate name, it is presumed that the company is legally capable of taking and holding the land.¹³ Certain names are forbid-

6. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

7. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080. See *Consolidated Concessions Co. v. McConnell*, 40 Cal. App. 443, 180 Pac. 842, where a complaint alleged that a corporation was organized at a certain time, but there was no allegation that it continued to exist thereafter, and the complaint was held insufficient on de-

murrer on that ground, among others.

8. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

9. *Matter of La Societe Francaise etc.*, 123 Cal. 525, 56 Pac. 458, 787.

10. Civ. Code, § 354, subd. 1.

11. *Curtiss v. Murry*, 26 Cal. 633.

12. See *supra*, § 82.

13. *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886; *Hagar*

den to be used by ordinary corporations, such, for instance, as names indicating that the corporation is engaged in the banking business, when such is not the case.¹⁴ An individual cannot, by assuming the name of a corporation, where there is no corporate organization, become a corporation de facto.¹⁵ But of course where vendors use a corporate name in making a sale and restrict their agent to signing the contract in that form, they cannot impeach the contract because so made.¹⁶ The identity of a thing may be presumed from identity of name. Where the only material issue is whether or not the plaintiff, known by a certain name, was incorporated, this is no matter of defense, and if it were, it could be settled by an examination of the public records.¹⁷ And where a supposed corporation appears and defends an action, it being subsequently discovered that the individual served as an officer was doing business under the corporate name, the court has power to substitute the name of the individual by amendment for that of the corporation.¹⁸

§ 84. Misnomer of Corporation.—Section 357 of the Civil Code provides that

“The misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended.”

And it is said to be the general rule that the misnomer of a corporation will not invalidate a grant or conveyance to or by it if it appears from the instrument, or is shown by such evidence as is admissible upon the question, that it was the corporation intended.¹⁹ So, where the corpo-

v. Board of Suprs. of Yolo County, 47 Cal. 222.

14. Civ. Code, § 290½; Bank Act, §§ 12, 12a. See BANKS, vol. 4, p. 116 et seq.

15. People v. Volcano etc. Road Co., 100 Cal. 87, 34 Pac. 522.

16. Karns v. Olney, 80 Cal. 90, 13 Am. St. Rep. 101, 22 Pac. 57.

17. Sociedad etc. v. Santa Clara Valley Bank, 24 Cal. App. 592, 141 Pac. 1054. See NAMES.

18. Walsh v. Decoto, 33 Cal. App. Dec. 447, 194 Pac. 288.

19. Sixth District Agr. Assn. v. Wright, 154 Cal. 119, 97 Pac. 144 (stating the rule and citing author-

rate name consists of several words, omission of part of the name will not vitiate a grant made to it or an act done by it, where the corporation intended can be identified.²⁰ Nor does the use of abbreviations in a corporate name invalidate an instrument or record, the name being sufficiently accurate to indicate the corporation intended.¹ And so, an assessment on the property of the corporation by an abbreviated name is good.²

In the matter of actions against corporations and in legal process, a misnomer is not fatal. Thus, where notice of garnishment is served on a corporation, the fact that the name is incorrectly given therein does not invalidate it;³ nor is the lien of an attachment affected by a misnomer of the corporation defendant.⁴ So, where the summons in a suit against the corporation is served on the right party, the court has jurisdiction,⁵ and may correct the misnomer by amendment,⁶ especially where there has been a general

ities thereto); *People v. Sierra etc. Min. Co.*, 39 Cal. 511.

20. *Underhill v. Santa Barbara Land etc. Co.*, 93 Cal. 300, 28 Pac. 1049 (note and mortgage not invalidated). And see *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377, holding that an error in designating the corporation owner in an assessment may be disregarded under the provisions of act of March 6, 1889 (Stats. 1889, p. 70).

1. *Goldberg, Bowen & Co. v. Dimick*, 169 Cal. 187, 146 Pac. 672 (holding that the use of the abbreviation "inc." is equivalent to the use of the words "a corporation"); *People v. Bogart*, 45 Cal. 73 (holding that the use of an abbreviation of the name by the officers of the corporation is not an usurpation and will not support a proceeding in quo warranto).

2. *Lake County v. Sulphur etc. Min. Co.*, 66 Cal. 17, 4 Pac. 876; *People v. Sierra etc. Min. Co.*, 39 Cal. 511. See ABBREVIATIONS, vol. 1, p. 83.

3. *Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93.

4. *Hammond v. Starr*, 79 Cal. 556, 21 Pac. 971.

5. *Thompson v. Southern Pac. Co.*, 180 Cal. 730, 183 Pac. 153.

6. *Thompson v. Southern Pac. Co.*, 180 Cal. 730, 183 Pac. 153; *Parrott v. Byers*, 40 Cal. 614.

The mere correction of a misnomer, however, is not a substitution of parties. The correction is justified under section 473 of the Code of Civil Procedure, permitting amendments of a pleading or proceeding by adding or striking out the name of a party or correcting a mistake in the name of a party;

appearance.⁷ The error is, of course, waived where the company appears in its true name without objection.⁸

§ 85. Use of Similar Corporate Names.—The secretary of state is forbidden to file any articles or issue any certificate of incorporation where the articles set forth the corporate name of any corporation theretofore organized in California, or a name so closely resembling the name of such other corporation as will tend to deceive.⁹ Whether or not the state could in a proper action dissolve the corporation or compel it to change its name on the ground of the misleading character of its name has not been decided; but where the certificate is issued and the corporation has done business under the name therein in good faith, it is at least a *de facto* corporation, and the introduction of its articles in evidence cannot be objected to on the ground that the name so closely resembles that of a pre-existing corporation that it would tend to deceive, and that therefore under section 296 of the Civil Code the secretary of state should have refused to file the articles.¹⁰

In the case of a revivor of a corporation which has suffered forfeiture for failure to pay its license tax under the old license acts,¹¹ if the name of the corporation has been adopted by another corporation since the date of forfeiture, or if another corporation has adopted a name so closely resembling such name as will tend to deceive, the corporation is entitled to a certificate of revivor only on adopting a new name. Such corporation has the right to use its former name or take a new one only on filing application therefor with the secretary of state and upon the issuance of his certificate setting forth the right to take

Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763. Turnpike Road Co., 49 Cal. 269. See APPEARANCE, vol. 2, p. 1.
9. Civ. Code, § 296.

7. Nisbet v. Clio Min. Co., 2 Cal. App. 436, 83 Pac. 1077.

10. Vallejo etc. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

8. Hammond v. Starr, 79 Cal. 556, 21 Pac. 971; Mahon v. San Rafael

11. See *infra*, § 644.

such new name or use the former name, as the case may be; and the secretary of state is forbidden to issue a certificate permitting such corporation to take or use the name of any corporation theretofore organized, and which has not suffered forfeiture under the said license acts, or a name so closely resembling the name of such a corporation as will tend to deceive.¹² And similar provisions are made as to revivor from forfeitures under the franchise tax act of 1911.¹³ And it has been held under an act providing for proclamation to be issued by the governor declaring what foreign and domestic corporations are delinquent in the payment of the state license tax, that such proclamation need not specifically designate which of the corporations named therein are domestic and which are foreign—a designation of each, whether foreign or domestic, by its true name is sufficient.¹⁴

§ 86. Use of Trade Names.—Where persons have become entitled to the use of a trade name so that others would not be permitted to use it in connection with their business, a corporation will not be permitted to use it as a part of its corporate name. The corporation cannot, in such case, by indirection accomplish ends otherwise forbidden.¹⁵ Persons entitled to use a trade name may, however, embody it in the name of the corporation, and the corporation may thereafter sue to enjoin an infringement of the right to use such name.¹⁶ But, although an individual has a right to engage in business under his own

12. Stats. 1917, p. 371, § 14, also providing that the provisions of the Code of Civil Procedure relating to change of name (secs. 1275-1279), in so far as they conflict with section 14, are not applicable to corporations seeking revivor. See *Rossi v. Caire*, 62 Cal. Dec. 140, 199 Pac. 1042 (discussing the matter of new names upon revivor).

13. Pol. Code, § 3669d.

14. *Lewis v. Curry*, 156 Cal. 93, 103 Pac. 493 (commenting on the probable rarity of identical names).

15. *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014. See TRADEMARKS AND TRADE NAMES.

16. *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346, 53 L. E. A. 284, 63 Pac. 480.

name, it does not follow therefrom that he can confer the right to use his name upon a corporation for the purpose of enabling it to engage in a business which has been conducted by another corporation under a similar name, and it is now settled that he cannot do so. This must be especially true where he himself has caused the use of his name by the prior corporation. Whoever the corporators may be, they have no right fraudulently to adopt a name similar to that of another corporation for the purpose of invading its rights. Where such name is adopted, an injunction will issue to restrain the simulation, so far as necessary to protect the rights of the prior corporation, even to the extent of prohibiting the use of the name at all.¹⁷

An exclusive property right may be acquired in the name under which a business is conducted and such right may not be lawfully interfered with or obstructed. This protection is not limited to business or trading corporations, however, but is given to charitable, religious and other societies, and the fact that a society is not incorporated does not alter the rule, for, by incorporation, the right to use the name belonging to an unincorporated society cannot be acquired; the fact of incorporation is immaterial.¹⁸

§ 87. Change of Name in General.—A change in name is not the creation of a corporation within the meaning of the constitution forbidding the creation of corporations by special act,¹⁹ and confers no new corporate powers or franchises. The constitution does not forbid a change of names, but prohibits the legislature from changing them

17. *Dodge Stationery Co. v. Bank*, 119 Cal. 334, 51 Pac. 317, *Dodge*, 145 Cal. 380, 78 Pac. 879.

18. *Hooper v. Stone*, 36 Cal. App. Dec. 499.

19. *Pacific Bank v. De Ro*, 37 Cal.

538. See, also, *Murphy v. Pacific*

by special act,²⁰ which would seem to be the only way the legislature, by its own exclusive action, could effect a change of name in any case, since the reason for the change must be special, and the new name must necessarily be inserted in the legislative act.¹ A change of name cannot be said to be the same thing as a change of organization.² The fact that the name has been changed by order of court cannot aid the members of the corporation in diverting its property to unauthorized uses,³ and a mere organization under a changed name cannot be used to hide a fraudulent transfer of the corporate property from creditors.⁴

§ 88. Judicial Nature of Proceedings.—The statute provides for the bringing of a proceeding in the superior court for a change of name of a corporation or other person.⁵ Although the determination of the grounds upon which a change of name may be granted may, in the absence of constitutional prohibition, be the subject of legislative action, it is also one of those questions which the legislature may remit to the judiciary. Indeed, it has been said, from the very nature of the case the exercise of the power to change a name is quite as appropriate to the judicial as to the legislative branch of

20. See Const., art. IV, § 25 (subd. 6); *Matter of La Societe Francaise*, etc., 123 Cal. 525, 56 Pac. 458, 787.

1. *Matter of La Societe Francaise*, etc., 123 Cal. 525, 56 Pac. 458, 787.

2. *Cellulose Packing Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238 (holding change of name not to be within statute of another state requiring notice of "changes of organization" to be published, hence failure to publish could not invalidate the proceeding for change of name).

See note, 15 A. L. R. 1132, as to

liability of corporation for debts of predecessor, as affected by change of name.

3. *Baker v. Ducker*, 79 Cal. 365, 21 Pac. 764 (religious society). See *Cumberland College v. Ish*, 22 Cal. 641, as to averment of change of corporate name.

4. *Higgins v. California Petroleum etc. Co.*, 147 Cal. 363, 81 Pac. 1070; *Higgins v. California Petroleum etc. Co.*, 122 Cal. 373, 55 Pac. 155. See, also, *supra*, §§ 16, 18, 19.

5. Code Civ. Proc., §§ 1275, 1276.

the government. The legislature having prescribed the conditions upon which the court shall grant a change of name, the action of the court is not legislative, and the legislature may properly permit such name to be changed upon application to the court.⁶ Although a petition for change of name discloses neither a controversy nor an actual or threatened denial by any one of petitioner's rights, yet such proceeding is judicial in its nature.⁷

§ 89. What Corporations may Change Name.—Any religious, benevolent, literary or scientific corporation, or any corporation bearing or having for its name or using or being known by the name of any benevolent or charitable order or society, may apply for change of its name, the code providing that a corporation of these classes "or other corporation" may apply for a change of its corporate name.⁸ The general expression "or other corporation," however, is not limited to include only corporations ejusdem generis with those specially enumerated. The necessity or desirability of a change of name is as likely to occur in the case of a private corporation organized for profit as any other and there is, it has been observed, no reason why a change should not be permitted to such corporations as well as to those specifically named.⁹

§ 90. Petition for Change of Name.—Applications for change of name must be heard and determined by the superior courts,¹⁰ the application being made by petition to the court of the county in which the articles of incorporation were originally filed or in which the property of the corporation is situated. The petition must be signed by a

6. *Matter of La Societe Francaise, etc.*, 123 Cal. 525, 56 Pac. 458, 787. See NAMES.

7. *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 289, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, 88 Pac. 256.

8. Code Civ. Proc., § 1276.

9. *Matter of La Societe Francaise, etc.*, 123 Cal. 525, 56 Pac. 458, 787.

10. Code Civ. Proc., § 1275.

majority of the directors or trustees of the corporation and must specify the date of its formation, its present name, the name proposed and the reason for the proposed change.¹¹ It has been said that the legislature has done all that it could do under the restrictions of the constitution to prescribe the grounds upon which the court may grant a petition, namely, upon reason for such change being alleged and shown.¹² Where a reason stated is that the applicant proposes to conduct a new class of business in addition to its present business, and that it believes that it would be to its advantage to have its name indicate that fact so that customers and the general public may be informed by its name of the class of business conducted, this is sufficient to warrant the court in granting the application.¹³ Likewise, allegations that the French name of the corporation is cumbersome and inconvenient in the transaction of business; that its meaning is understood only by those having a knowledge of the French language or to those to whom its meaning has been explained; that the corporation is frequently referred to under the proposed name and that its business and best interests would be promoted by the change, are sufficient to warrant a change of name.¹⁴

§ 91. Notice of Hearing of Petition.—The statute provides that upon the filing of the application, the court shall thereupon make an order reciting the filing of the application, the name of the corporation by whom it is filed and the name proposed, and directing all persons interested in the matter to appear at a time and place specified, not less than four nor more than eight weeks from the time of

11. Code Civ. Proc., § 1276. See *supra*, § 51, as to filing of articles in counties, and *supra*, § 50, as to change requiring original filing with the secretary of state under amendment of 1921.

12. *Matter of La Societe Fran-*

caise, etc., 123 Cal. 525, 56 Pac. 458, 787.

13. *Petition of Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

14. *Matter of La Societe Francaise, etc.*, 123 Cal. 525, 56 Pac. 458, 787.

making the order, to show cause why the application should not be granted.¹⁵ No discretion whatever is given to the court in the matter of making this order; it must be made upon the filing of a petition in the form prescribed by law, and the court simply fixes therein the date when the matter shall come on for hearing.¹⁶ A copy of the order to show cause must be published for four successive weeks in a newspaper of general circulation designated in the order, printed in the county, or if no newspaper be printed in the county, a copy of the order must be posted by the clerk in three of the most public places in the county for a like period, proof of such publication or posting being made to the satisfaction of the court at the time of the hearing.¹⁷

§ 92. Hearing and Order for Change of Name.—The application must be heard at such time as the court may appoint and objections may be filed by any person who can, in such objections, show to the court good reason against the change of name.¹⁸ Such an opposition by a stockholder may be in the nature of a demurrer.¹⁹ A corporation claiming that the name proposed so closely resembles its own as would tend to deceive the public is interested to that extent and may oppose the change.²⁰ The court may examine any of the petitioners, remonstrants, or other persons, touching the application and may make an order changing the name or dismissing the application, as to the court may seem right and proper. The applicant corporation must file in court at the time of the hearing the certificate of the secretary of state that the

15. Code Civ. Proc., § 1277.

16. *Petition of Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56 (holding that a judge, even though disqualified to act within section 170 of the Code of Civil Procedure, may nevertheless make the order).

17. Code Civ. Proc., § 1277. See *NAMES*.

18. Code Civ. Proc., § 1278.

19. *Matter of La Societe Francaise, etc.*, 123 Cal. 525, 56 Pac. 458, 787.

20. *Petition of Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

new name desired to be used is not the corporate name of any existing corporation, and that the proposed name does not so closely resemble the name of any such existing corporation as will tend to deceive.¹ And where the applicant has filed the certificate of the secretary of state, this is support for holding that no substantial right of the other corporation would be invaded by the proposed change.² If findings of fact on the part of the trial court are essential, the recitals in its order may be taken as constituting such findings; however, formal findings of fact are not required in a proceeding of this character.³ Where a change of name is granted, the corporation must file in the office of the secretary of state and in the office of the county clerk of each county in which the original articles or certified copies thereof are required by law to be filed, a certified copy of the decree changing its name.⁴ A certified copy of the decree is required to be filed with the secretary of state within thirty days from the date thereof.⁵

Seal.

§ 93. **In General.**—A corporation is given power by statute "to make and use a common seal, and alter the same at pleasure."⁶ And since it may alter its seal at pleasure, it may adopt the private seal of an individual, as its own, if it choose to do so; but when adopted it must be used as the seal of the corporation, and not as that of the individual. If it be affixed as the seal of the individual, it cannot be treated as that of the corporation, and a declaration in the instrument itself that it is so affixed is conclusive of its character and effect. It is unnecessary

1. Code Civ. Proc., § 1278.

2. Petition of Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56.

3. Petition of Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56. See Matter of La Societe Francaise, etc., 123 Cal. 525, 56 Pac. 458, 787,

where findings were made, although not held to be necessary and without passing on the question.

4. Civ. Code, § 300a.

5. Code Civ. Proc., § 1279.

6. Civ. Code, § 354, subd. 3.

to state in a conveyance that the seal used is that of the corporation, if the fact otherwise appear, either presumptively from the language of the conveyance or by evidence aliunde. The fact must appear, however, in some manner.⁷ Where there is no corporate seal, authority to execute a deed, and, by implication at least, to adopt a seal pro hac vice by the party assuming that power, must be shown.⁸ Admitting that the conferring on an agent of power to execute a deed necessarily includes the power to adopt a seal on behalf of the corporation for the occasion and that the private seal of the agent may be adopted, nevertheless if a seal regularly adopted by the corporation is not in fact used, it is necessary to show authority in the agent to execute the deed in order to show by implication authority to adopt a seal for the occasion.⁹ The corporate seal may be affixed to an instrument by a mere impression upon the paper on which such instrument is written.¹⁰

§ 94. Necessity for Seal.—At common law, corporations aggregate were incapable of making contracts or of appointing agents or attorneys except by a deed or power in writing under their corporate seals.¹¹ But with the advancing demands for greater celerity of action, the common-law rule has been long since abolished in this country.¹² The affixing of the corporate seal, while presumptive prima facie evidence that execution was authorized by the corporation,¹³ is no longer essential to the validity of a

(See "Erratum"
1926 Supp. 475)

7. *Richardson v. Scott River etc. Min. Co.*, 22 Cal. 150.

8. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

9. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

10. Civ. Code, § 1628.

11. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946; *Crowley v. Genesee Min. Co.*, 55 Cal. 273; *Richardson v. Scott River etc. Min.*

Co., 22 Cal. 150 (holding seal necessary to mortgage by corporation); *Holland v. San Francisco*, 7 Cal. 361 (dissenting opinion of Murray, C. J.); *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1; *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 Pac. 964.

12. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946; *Crowley v. Genesee Min. Co.*, 55 Cal. 273.

13. See *infra*, § 95.

contract of the corporation,¹⁴ for the fact that the contract was duly authorized may be shown by parol.¹⁵ A sole corporation, of course, has no need of a corporate seal.¹⁶

§ 95. Rule as to Effect of Seal.—The seal of a corporation affixed to an instrument is evidence that it is a corporate act.¹⁷ The modern and by far the more sensible rule is that the seal itself performs no further or greater function than to import prima facie verity of the due execution by the corporation of its written obligations, that is, it merely stands as prima facie evidence that the contracts made by a corporation are executed by its authority.¹⁸ And so, where the seal appears to be affixed to an instrument and the signatures of the proper officers are proved, courts presume that the officers did not exceed their authority and that the instrument was executed by authority of the corporation.¹⁹ It follows that the burden in such

14. *City St. Imp. Co. v. Laird*, 138 Cal. 27, 70 Pac. 916; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623 (stating the rule that a corporation may be bound by a promise express or implied resulting from acts of its authorized agents, although such authority be only by virtue of a corporate vote, and accompanied by the corporate seal); *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 Pac. 964; *Leitch v. Marx*, 21 Cal. App. 208, 131 Pac. 328; *Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023, 1026; *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

15. *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 Pac. 964.

16. *Roman Catholic Archbishop v. Shipman*, 79 Cal. 288, 21 Pac. 830.

17. *Colton Land & W. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 378.

18. *Commercial Security Co. v.*

Modesto Drug Co., 43 Cal. App. 162, 184 Pac. 964, per Hart, J.

19. *Anderson v. Wickliffe*, 178 Cal. 120, 172 Pac. 381; *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516; *Potts Drug Co. v. Benedict*, 156 Cal. 322, 25 L. R. A. (N. S.) 609, 104 Pac. 432; *City St. Imp. Co. v. Laird*, 138 Cal. 27, 70 Pac. 916; *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262; *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122; *Blood v. La Serena etc. Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Andres v. Fry*, 113 Cal. 124, 45 Pac. 534; *Gutzeit v. Pennie*, 95 Cal. 598, 30 Pac. 836; *Underhill v. Santa Barbara etc. Imp. Co.*, 93 Cal. 300, 28 Pac. 1049; *Burnett v. Lyford*, 93 Cal. 114, 28 Pac. 855; *Vaca Valley etc. R. R. v. Mansfield*, 84 Cal. 560, 24 Pac. 145; *Crescent City etc. Co. v. Simpson*, 77 Cal. 286, 19 Pac. 426; *Schallard v. Eel River etc. Nav. Co.*, 70 Cal. 144, 11

cases is shifted upon the adversary party to overcome that presumption by showing want of authority in such officers to execute the instrument as that of the corporation.²⁰ However, the showing is *prima facie* only and subject to be overthrown by proof of the fact that authority was lacking;¹ but until overcome by other evidence, this *prima facie* showing of due execution is sufficient.² Where, of course, the instrument is executed without affixing the corporate seal, it is incumbent upon the party relying on it to show affirmatively that it was executed by authority of the corporation.³ But a matter not involved in the execu-

Pac. 590; *Bliss v. Kaweah etc. I. Co.*, 65 Cal. 502, 4 Pac. 507; *Southern California Colony Assn. v. Bus-tamente*, 52 Cal. 192; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *McCracken v. City of San Francisco*, 16 Cal. 591 (Cope, C. J., concurring); *San Ramon Valley Bank v. Walden*, 35 Cal. App. Dec. 641, 200 Pac. 662; *Arnold v. La Belle Oil Co.*, 32 Cal. App. Dec. 100, 190 Pac. 815; *Jump v. Barr*, 31 Cal. App. Dec. 624, 189 Pac. 334; *Macknight v. Davitt*, 37 Cal. App. 720, 174 Pac. 77; *Stone v. Gray*, 10 Cal. App. 609, 103 Pac. 155; *Greve v. Echo Oil Co.*, 8 Cal. App. 275, 96 Pac. 904; *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260. The rule has been applied to instruments other than contracts and deeds. Thus, the verity of a certificate of stock may be presumed from the corporate seal attached with the signatures of the proper officers: *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950. A certified copy of a resolution authenticated by the corporate seal is presumptively the act of the corporation and admissible in evidence: *Purser v. Engle Lake etc. Co.*, 111 Cal. 139, 43 Pac. 523;

Hawley v. Gray Bros. etc. Paving Co., 106 Cal. 337, 39 Pac. 609.

20. *Blood v. La Serena etc. Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Arnold v. La Belle Oil Co.*, 32 Cal. App. Dec. 100, 190 Pac. 815; *Jump v. Barr*, 31 Cal. App. Dec. 624, 189 Pac. 334; *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260.

1. *Blood v. La Serena etc. Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Vaca Valley etc. R. R. v. Mansfield*, 84 Cal. 560, 24 Pac. 145.

2. *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262; *Watkins v. Glas*, 5 Cal. App. 68, 89 Pac. 840.

3. *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580; *Barney v. Pforr*, 117 Cal. 56, 48 Pac. 987; *Fudiekar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024; *Butler v. Solano Land Co.*, 31 Cal. App. Dec. 509, 188 Pac. 1019. See *Fischer v. Lukens*, 41 Cal. App. 358, 182 Pac. 967 (deed produced without corporate seal is inadmissible without a showing of the authority of the officers who executed it).

tion of the instrument itself, such as the consent of stockholders, is not to be presumed from the corporate seal.⁴ And a recital in a deed as recorded that the grantor corporation "has hereunto set its name and caused its common seal to be affixed by its president, thereunto duly authorized by resolution of its board of directors" is not evidence of the existence of such facts in the absence of a statement or other evidence by the recorder that the corporate seal was affixed to the original deed.^{4a}

§ 96. Reason for the Rule.—The reason for the rule that the common seal of a corporation affixed to an instrument raises the presumption that the execution of the same was by officers duly authorized was expressed by the court in an early case in the following language:

"The rule must be as stated on principle, independent of authority. Any other would be subversive of the public interests, for no man could deal in safety with corporations, and all business transactions with these institutions would almost necessarily cease, and the end of their creation fail of accomplishment. Confidence is a necessary element in all business transactions. If strangers cannot rely, at least, *prima facie* upon deeds of private corporations apparently regularly executed in pursuance of the powers conferred by their charters under the corporate seal, and attested by the signatures of the officers, upon what may they rely? This is the most direct, formal and solemn assurance that can possibly be given by those authorized to give assurances. It is the legally appointed mode in which the corporation speaks to the external world, and manifests its corporate will. Parties dealing with private corporations have no other reliable means of ascertaining the circumstances under which the act is done."⁵

§ 97. Proof of Seal.—One offering a paper purporting to be an instrument of a corporation under seal may be

4. *Bennett v. Red Cloud Min. Co.*,
14 Cal. App. 728, 113 Pac. 119.

4a. *Fischer v. Lukens*, 41 Cal.
App. 358, 182 Pac. 967.

5. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300
(per Sawyer, C. J.).

called upon to make proof that the seal employed is the corporate seal.⁶ The earlier strictness of proof in this regard has been much abated by later decisions, and it is now sufficient if the plaintiff can show either that the seal is the regularly adopted common seal of the corporation or that, without such formal adoption, it has been habitually used as such. Where, however, the instrument is the first upon which the seal has been used, if it is shown that it was afterwards employed in all transactions requiring the impress of a seal, this is a sufficient showing to warrant a finding that it had been adopted by the corporation by use.⁷ Where the seal affixed purports to be the corporate seal of the corporation, however, in the absence of objection it is assumed to be genuine, and the burden of proof is on the other party.⁸

§ 98. Authority to Affix Seal.—The seal affixed to a contract or conveyance does not render the instrument a corporate act unless it is affixed by an officer or agent duly authorized.⁹ It must be affixed by the officer to whose custody it is confided or under his authority,¹⁰ or by some person specially authorized, such as the officer acting in consequence of the vote of the board of directors.¹¹ The secretary of the corporation is usually the custodian of the

6. *Blood v. La Serena etc. Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

7. *Blood v. La Serena L. & Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

8. *Burnett v. Lyford*, 93 Cal. 114, 28 Pac. 855 (objection to genuineness or sufficiency of the evidence cannot be urged for the first time on appeal). See *APPEAL AND ERROR*, vol. 2, pp. 248, 267.

9. *Bliss v. Kaweah etc. Co.*, 65 Cal. 502, 4 Pac. 507.

10. *Bliss v. Kaweah etc. Co.*, 65 Cal. 502, 4 Pac. 507; *McCracken v. City of San Francisco*, 16 Cal. 591 (Cope, C. J., concurring).

11. *Bliss v. Kaweah etc. Co.*, 65 Cal. 502, 4 Pac. 507, holding that authority to convey implies authority to affix the corporate seal to an instrument requiring it. See *Andres v. Fry*, 113 Cal. 124, 45 Pac. 534.

seal, and is the proper officer to affix it;¹² and the general custom of business or authority of the board not entered of record is sufficient to warrant the secretary in attaching the seal.¹³ But where it is the custom for the president to affix the seal, an instrument under seal is admissible in evidence even though it is testified that there had been no action of the board of directors authorizing him to execute the instrument or affix the seal.¹⁴

The seal is the signature of the corporation.¹⁵ Since it is in itself *prima facie* evidence that it was affixed by proper authority, the burden of showing want of authority is upon the objecting party.¹⁶ The mere fact that the record of the board of directors does not disclose such authority is not of itself conclusive proof in that regard;¹⁷ and the presumption of authority to affix the seal will not be overcome by the mere fact that there was no vote of the directors on the subject.¹⁸

Place of Business—Residence.

§ 99. **In General.**—It has been said that a fundamental characteristic of a corporation is that it must have a *place*¹⁹—some locality where its principal office or busi-

12. *Underhill v. Santa Barbara etc. Imp. Co.*, 93 Cal. 300, 28 Pac. 1049.

13. *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260.

14. *Burrell v. Southern California Canning Co.*, 35 Cal. App. 162, 169 Pac. 405.

15. *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260.

16. *Underhill v. Santa Barbara etc. Imp. Co.*, 93 Cal. 300, 28 Pac. 1049; *Burnett v. Lyford*, 93 Cal. 114, 28 Pac. 855; *Vaca Valley etc. R. R. v. Mansfield*, 84 Cal. 560, 24 Pac. 145; *Bliss v. Kaweah etc. Co.*, 65 Cal. 502, 4 Pac. 507; *Southern*

California Colony Assn. v. Bustamente, 52 Cal. 192; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *McCracken v. City of San Francisco*, 16 Cal. 591 (Cope, C. J., concurring); *Macknight v. Davitt*, 37 Cal. App. 720, 174 Pac. 77; *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260. See *supra*, § 95, as to effect of seal.

17. *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260.

18. *Bliss v. Kaweah etc. Co.*, 65 Cal. 502, 4 Pac. 507.

19. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 363.

ness is established and where it may very properly be said to "reside."²⁰ The articles of incorporation are required to set forth the place where the principal business is to be transacted,¹ and at this place is the office of the corporation.² The constitution enjoins on every corporation organized or doing business in California the duty to have and maintain an office or place of business in the state for the transaction of its business and where its records shall be kept.³ At this office its records are kept; there, the meetings of its directors and stockholders are held, and from thence emanate directions for the conduct of its affairs.⁴ And since the directors have or ought to have an office for the transaction of the business of the corporation, the denial that it has such office by them is insufficient to raise a material issue.⁵ The place where the operations are carried on is not necessarily the principal place of business; but a statement that a city is the place of business would seem to imply that it is not only the principal but the only place of business.⁶ Whether the

20. *Jenkins v. California Stage Co.*, 22 Cal. 537. See *infra*, § 100, as to residence of corporations.

1. Civ. Code, § 290. See *supra*, § 47, subd. 3.

2. *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641.

3. Const., art. XII, § 14 (applying to corporations other than religious, educational or benevolent). See *Shaver v. Bear River etc. Min. Co.*, 10 Cal. 396, holding that a managing agent of a corporation has power without special authorization to secure such a place for the corporation.

4. *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641. See *Creditors v. Consumers' Lumber Co.*, 98 Cal. 318, 33 Pac. 196 (holding under insolvency act permitting

petition to be filed in county where debtor resides or has his place of business, that petition might be filed in county where its mill was located, although its principal place of business was elsewhere; and holding further that parol evidence is admissible to show in what county the place of business was located); *Harris v. McGregor*, 29 Cal. 124.

5. *Chapman v. Doray*, 89 Cal. 52, 26 Pac. 605 (holding that failure to maintain office did not excuse failure to post reports required by law to be posted at the office).

6. *Ex parte Spring Valley Water Works*, 17 Cal. 132 (holding that such statement was sufficient compliance with statute requiring articles to state the principal place of business).

phrase "principal place of business" is synonymous with that of "office" has not been decided, but apparently the phrases are not the same.⁷ After dissolution a corporation is not alive and it is not strictly accurate to say that it has a place of business.⁸

§ 100. **Residence.**—No statute makes the principal place of business of either a domestic or foreign corporation its residence for the purpose of determining the county in which the trial of an action against it shall be had;⁹ but a corporation like an individual has a place of residence.¹⁰ The residence of a California corporation is held to be at its principal place of business,¹¹ although the place of

7. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15 (discussing section 319 of the Civil Code requiring meetings to be held at the "office or principal place of business" of the corporation). See *Stockton Gas etc. Co. v. San Joaquin County*, 148 Cal. 313, 7 Ann. Cas. 511, 5 L. R. A. (N. S.) 174, 83 Pac. 54, commenting upon but not deciding whether the phrase "principal place of business" as used in section 3628 of the Political Code means the actual place of the transaction of franchise business, or the office of the corporation where business of a strictly corporate nature is transacted.

8. *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, 156 Pac. 65 (holding, nevertheless, that a statute giving jurisdiction to appoint a receiver to the court of the county where the corporation has its principal place of business or does business means the place where the corporation had its principal place of business or did business at the time of its dissolution).

9. *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641.

10. *Gallup v. Sacramento etc. Drainage Dist.*, 171 Cal. 71, 151 Pac. 1142; *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41.

11. *Gallup v. Sacramento etc. Drainage Dist.*, 171 Cal. 71, 151 Pac. 1142; *Cook v. W. S. Ray Mfg. Co.*, 159 Cal. 694, 115 Pac. 318; *Whitney v. Sellers' Commission Co.*, 130 Cal. 188, 62 Pac. 472; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209; *Trezevant v. W. R. Strong Co.*, 102 Cal. 47, 36 Pac. 395; *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318, 33 Pac. 196; *McSherry v. Pennsylvania etc. Min. Co.*, 97 Cal. 637, 32 Pac. 711; *Buck v. City of Eureka*, 97 Cal. 135, 31 Pac. 845; *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157; *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498; *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641; *Jenkins v. California Stage Co.*, 22 Cal. 537; *Lakeside Ditch Co. v. Packwood Ditch Co.*, 33 Cal. App. Dec. 754, 195 Pac. 284; *Hammond v. Ocean Shore Dev. Co.*, 22 Cal. App. 167, 133 Pac. 978; *Aisbett v. Paradise etc. Mill Co.*, 21 Cal. App.

business of a corporation may be contradistinguished from its residence.¹² The franchise to exist and act as a corporation is inseparable from the being or personality of the corporate body and has its situs where the corporate entity has its domicile or residence.¹³ A California corporation, however, has no residence outside the state, and it may be that such corporation is estopped from asserting its residence to be in another county from the county or the county including the town or city mentioned in its articles. Even though formed to do business in another state, such corporation has its locality and its life in California, and though by comity it may sue and be sued in the other state, it does not reside there, unless a statutory residence has been given it by the legislature of that state.¹⁴ The principal place of business of a foreign corporation, for the purpose of establishing its residence, is in the state of incorporation, and a principal place of business in California not expressly authorized by law cannot be held to admit the corporation to the constitutional rights and

267, 131 Pac. 330; *Krogh v. Pacific Gateway etc. Co.*, 11 Cal. App. 237, 104 Pac. 698; *Bloom v. Michigan etc. Min. Co.*, 11 Cal. App. 122, 104 Pac. 324; *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41; *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397; *San Joaquin etc. Irr. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285. See *California etc. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394, 4 Pac. 344, contra, overruling *Jenkins v. California Stage Co.*, 22 Cal. 537, which case was, however, affirmed in *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641, and *California etc. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 409, 4 Pac. 388, contra, following case of same name at page 394 of same volume of reports.

12. *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318, 33 Pac. 196 (under statute providing for the filing of a petition for an order of adjudication of insolvency "in the county in which the debtor resides or has his principal place of business").

13. *San Joaquin etc. Irr. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. 285.

14. *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641. See *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865, to the effect that though the residence of a California corporation is deemed to be in this state, yet under the provisions of section 412 of the Code of Civil Procedure, it may be held to depart from the state under certain circumstances.

privileges of a domestic corporation.¹⁵ No statute having ever given a local county residence to such a corporation where alone it can be sued, neither its liability to be sued in the courts of California nor the county which permits it to apply to such courts for relief confers a county residence upon it.¹⁶

§ 101. Change of Principal Place of Business.—Every corporation created under the laws of California may change its principal place of business from one place to another in the same county or from one city or county to another city or county within the state.¹⁷ Before such change is made the consent in writing of holders of two-thirds of the capital stock must be obtained and filed in its office,¹⁸ or if the corporation has no capital stock, then the consent in writing of two-thirds of the members must be obtained and filed in its office.¹⁹ When such consent is obtained and filed, notice of the intended removal or change must be published at least once a week for three successive weeks,²⁰ in a newspaper published in the county in which the principal place of business is situated, giving the name of the county or city where it is situated and that to which it is intended to remove it. Whenever any such change is made, a copy of the resolution or action of the board of directors authorizing the same together with a copy of an affidavit of the publication of the notice, all duly certified by the president and secretary of the corporation with the corporate seal affixed, must be filed in each office where the original articles of incorporation or any

15. *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41.

16. *Thomas v. Placerville etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641. See *In re Castle Dome etc. Co.*, 3 Cal. Unrep. 1, 18 Pac. 794, where a foreign corporation had a place of business in Alameda County and as this was its only place of business in this state, the court said it must

be considered as its principal place of business so far as this state is concerned.

17. Civ. Code, § 321a.

18. Civ. Code, § 321a. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

19. Civ. Code, § 321a.

20. Civ. Code, § 321a; *Chapman v. Doray*, 89 Cal. 52, 26 Pac. 605.

copy thereof is required to be filed.¹ The provisions of the statute, however, as to consent, notice or publication do not, by the express terms of the code, apply to a removal from one location to another in the same city, town or village;² and such is the rule even if the "office" of a corporation be treated as equivalent to its "principal place of business."³ Where a board has been illegally elected, any proceeding by it for the removal of the office of the company is, of course, a mere nullity where taken after the regular and valid election of a new board.⁴

V. PROMOTERS AND SECRET PROFITS.

§ 102. **In General.**—The word "promoter" involves the idea of exertion for the purpose of floating a corporation, and also the idea of some duty toward the company itself imposed by or arising out of the position which the promoter assumes toward it.⁵ However, the word has no technical legal meaning; it applies to any person who takes an active part in inducing the formation of a company and the subscription of its shares, whether he afterwards becomes connected with the company or not.⁶ The projecting and organizing of a corporation to purchase certain properties and the inducing of others to join in the enterprise is said to be the essence of promotion.⁷ Thus, the

1. Civ. Code, § 321a. See *Aisbett v. Paradise Mt. Min. etc. Co.*, 21 Cal. App. 267, 131 Pac. 330, where the contention was made that the principal place of business was moved from one county to another by order of the board of directors pursuant to section 321a, but the matter was held not to be in question.

2. Civ. Code, § 321a.

3. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

4. *Guaranty Loan Co. v. Tread-*

well, 35 Cal. App. Dec. 643, 200 Pac. 653.

5. *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496. See *infra*, § 103, as to fiduciary relation of promoter to corporation.

6. *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600.

7. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243.

The promoter brings together the persons who become interested in the enterprise and sets in motion

obtaining of subscriptions is practically a part of the formation of the corporation, and in obtaining them it is said that one becomes a promoter.⁸ But the fact that one advances money to a promoter to procure property does not render the lender of the money liable upon the notes of the promoter as an undisclosed principal.⁹

§ 103. Fiduciary Relation and Duty.—A promoter occupies a fiduciary relation towards the corporation,¹⁰ towards his associate promoters,¹¹ and likewise, towards all who, from the time the project of a corporation is started, become subscribers thereto in consequence of the promoters' efforts.¹² Associates in a common enterprise under whatever guise have a duty to each other to make full disclosure of any preference or profit not common to all of the associates. The implied undertaking between them is that each engages in an enterprise solely for the mutual benefit and advantage of all, and has a common interest with the others according to the amount of his

the machinery which looks to the formation of the corporation; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Ex-Mission Land etc. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600.

8. *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496.

9. *Krohn v. Lambeth*, 114 Cal. 302, 46 Pac. 164.

10. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Lomita Land & W. Co. v. Robinson*, 164 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Ex-Mission Land & W. Co. v. Flash*,

97 Cal. 610, 32 Pac. 600; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341.

11. *Bellus v. Peters*, 165 Cal. 112, 130 Pac. 1186; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341. And cases cited *infra*.

12. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Blood v. La Serena Land & W. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252 (dissenting opinion of McFarland, J.); *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341. And see *infra*, § 105.

subscription.¹³ And justice demands that the promoters shall not derive any unjust advantage over subscribing stockholders through their control over the organization or management of the company, without a full and fair disclosure of the transaction.¹⁴ As between associates engaged in organizing the corporation, false and fraudulent statements by one of them to the others, and the obtaining of property in connection therewith in fraud of the associates, give right to relief, even though the defrauded persons have parted with their allotments of stock.¹⁵

§ 104. Secret Profits Generally.—Promoters being fiduciaries, bound to make full disclosure to the corporation and the stockholders of any interest in the transaction,¹⁶ it is the general rule that they are forbidden to make any secret profits out of their relation;¹⁷ and it is immaterial that the corporation has not been damaged by the transaction. Such secret profits belong to the corporation for the benefit of its stockholders.¹⁸ The promoters are under a duty, if they sell to the corporation, to make the sale without profit, unless they disclose that they are receiving a profit.¹⁹ The fact that the property at the time was of the full value of the purchase price in no way relieves the

13. *Munson v. Fishburn*, 183 Cal. 206, 190 Pac. 808; *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10. See JOINT ADVENTURES.

14. *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341.

15. *Bellus v. Peters*, 165 Cal. 112, 130 Pac. 1186.

16. See *supra*, § 103.

17. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *Western States Life Ins. Co. v. Lockwood*,

173 Cal. 734, 161 Pac. 498; *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

18. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496.

19. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243.

promoter of the duties and responsibilities resting upon him as a fiduciary.²⁰ The real offense is the receiving of money while occupying a fiduciary position and the concealing of the benefit received from those whose interests they were bound to protect.¹

§ 105. Stockholders Protected.—Aside from the disclosure which promoters owe to those who join them in the enterprise of forming a new corporation,² the future shareholders are entitled to the protection of an absolutely independent directorate and to full disclosure of the actual facts.³ And so, where the corporation, at the time of and after a purchase, is controlled and directed by the promoters so that the knowledge of the directors is but the knowledge of the promoters, and a disclosure to the directors but a disclosure to the promoters, the fact that a disclosure is made is not material and will not relieve the promoters from liability for their fraud.⁴ In such a case, knowledge of the fraud by the directors would not be knowledge to the stockholders; and a fraud so practiced upon the stockholders could not be ratified or even waived by the directors.⁵

If, in the promotion of the corporation, it is contemplated by those organizing it that shares of its stock shall be offered for sale in order that others may become future stockholders, such promoters, in dealing with the corporation, occupy a fiduciary relation to it for the benefit of the future stockholders and their interests are entitled to protection from concealed benefits or profits acquired by

20. *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

1. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496. See

TRUSTS.

2. See *supra*, § 103.

3. *Western States Life Ins. Co. v.*

Lockwood, 166 Cal. 185, 135 Pac. 496.

4. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341.

5. *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

the promoters in their transactions with the corporation. Likewise, such stockholders are entitled to a full disclosure of the true facts of the purchase price of property turned over to the corporation; and any advantages or benefits accruing to the promoters by failure so to do or any concealment constitutes a fraud on the corporation.⁶ In determining whether it is intended that other stockholders shall be invited to take stock, the court will go beyond the mere form which the transaction takes and will look to its substance. Thus, where stock is nominally issued to a promoter, but the plan is to return a part of it to the treasury to be sold to future stockholders, the promoter stands in a fiduciary relation to such future stockholders and may make no secret profits in the transfer of property.⁷

§ 106. Sales to Corporation in General.—If a promoter has property which he desires to sell to the corporation, it is quite open for him to do so, but upon him, as upon any person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. Transactions by promoters with their companies wherein they deal honorably, with full disclosure and without seeking to influence the action of the corporation, will be upheld;⁸ but where they induce others to subscribe for shares for the purpose of selling property to the company when organized, they must faithfully disclose all facts relating to the property. If the promoters are guilty of any misrepresentation of facts or suppression of truth in relation to the character and value of the property or their personal interest in the proposed sale, the company is entitled to set aside the transaction or to re-

6. California-Calaveras Min. Co. v. Walls, 170 Cal. 285, 149 Pac. 595; Ed. 1025, 28 Sup. Ct. Rep. 634, is not followed in California).

Beal v. Smith, 31 Cal. App. Dec. 649, 189 Pac. 341 (the rule pronounced in the case of Old Dominion etc. Smelting Co. v. Lewisohn, 210 U. S. 206, 52 L. Ed. 595.

7. California-Calaveras Min. Co. v. Walls, 170 Cal. 285, 149 Pac. 595.

8. Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444.

cover compensation for any loss which it has suffered.* The gist of the wrong in such cases is the secrecy;¹⁰ so, if subscribers know that the promoter is making a profit, although they do not know the amount, this will not entitle them to complain, in the absence of misrepresentation.¹¹

§ 107. Sales by Owners.—The owners of any kind of property, may form an association with others and sell such property to the association at any price that may be agreed upon between them, no matter what it may have originally cost, provided there is no fraudulent misrepresentation made by the vendors to their associates; and the vendors are not bound to disclose the profit which they may realize by the transaction.¹² Thus, although one becomes a stockholder, he has a right to sell land to the corporation at an agreed price, there being no fraudulent misrepresentations in the transaction.¹³ But where persons form such an association, or begin the project of one, from that time they stand in a confidential relation to each other and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance without a full disclosure of the facts.¹⁴ Although the transaction appears on its face to be a sale, nevertheless if it is not in fact a sale by

9. *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595; *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600 (holding that the fact that the promoters purchased the land before the corporation was formed or steps taken toward its formation does not pre-

vent the recovery by the corporation of secret profits).

10. See *supra*, § 104.

11. *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10.

12. *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

13. *Blood v. La Serena etc. Water Co.*, 134 Cal. 361, 66 Pac. 317.

14. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

the owner, but the property is purchased by the promoter for the purpose of selling to the corporation, the concealment of the real nature of the transaction constitutes a fraud upon the associates. The promoter must disclose the fact that he is not the owner and that he has merely arranged to purchase the property for the purpose of turning it over to the company.¹⁵

§ 108. Liability for Fraud Generally.—Promoters perpetrating a fraud on the corporation are liable as joint tort-feasors,¹⁶ and a joint and several judgment against them for the full amount of secret profits is proper. Being participants in the scheme, they are each and all responsible for the full amount of the injury which their scheme worked upon those to whom they owed a fiduciary duty.¹⁷ It is not necessary that promoters should have been in a league from the beginning to defraud investors. They need not be in *pari delicto*. It is enough that each was at some time and in some degree a party to and aided the improper transaction; and it matters not how unequal may have been the assistance rendered, nor is it essential that such a participant should have shared at all in the profits of the fraud.¹⁸ Authority of agents of the promoters to sell the land of the promoters to the corporation for a commission tends, in connection with other evidence, to prove authority to such agents to promote the corporation; and evidence as to what such agents said to induce subscriptions to the agreement of the corporation to purchase is competent as against the promoters as their co-con-

15. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243. See *infra*, § 108, as to liability of an owner who enters into or abets the fraud of a promoter.

16. *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. E. A. (N. S.) 1106, 97 Pac. 10. And cases cited *infra*.

17. *Victor Oil Co. v. Drum*, 184

Cal. 226, 193 Pac. 243 (stating that if it is legitimate for the promoter to make a profit on the sale, the fact that he afterwards divides his profits with other defendants is wholly immaterial).

18. *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. E. A. (N. S.) 1106, 97 Pac. 10.

spirators.¹⁹ And an owner of property who conspires with promoters to induce the corporation to purchase it at a certain price upon the representation that it is a reasonable price and the one which has been agreed to be paid to him as owner, whereas it is greatly in excess of the sum agreed to be paid, is equally liable with the promoters for secret profits made on the sale.²⁰

§ 109. Enforcement of Liability.—Although rescission of the wrongful transaction is often a practicable mode of relief,¹ it is not the sole remedy,² and it is not exclusive of any other mode by which a court of equity might give appropriate relief, doing no injustice to the defendants.³ The company may elect either wholly to set aside the transactions or to recover the promoter's secret profits.⁴ The court can ascertain what the property actually cost the defendant promoters and hold them to account for the balance. This balance belongs equitably to those who paid the money and they can recover their pro rata share thereof.⁵ And the corporation may reclaim shares issued to

19. *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600.

20. *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10.

1. *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600. See *Buena Vista Fruit etc. Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386, holding, under the rule that he who would rescind a contract must put the other party in as good a situation as he was before, a corporation cannot confirm the promoter's contract as to the benefits while repudiating it as to its burdens. See *CONTRACTS*, vol. 6, §§ 230-236.

2. *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595; *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R.

A. (N. S.) 1106, 97 Pac. 10; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

3. *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600.

4. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Buena Vista Fruit etc. Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

5. *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

promoters as part of a wrongful transaction, or may recover their value as of the time of the wrong.⁶

In an action to enforce the liability of promoters, the corporation, as the party directly injured by the fraud, is the proper party to bring the action,⁷ although if it fails to bring it upon demand, a stockholder may himself sue.⁸

§ 110. Limitation and Laches.—An action to recover secret profits of promoters is plainly based on fraud, and the statute of limitations which applies is subdivision 4 of section 338 of the Code of Civil Procedure, which requires that relief must be sought within three years from the time of the discovery by the aggrieved party of the facts constituting the fraud.⁹ Where all the directors and stockholders either participated in or had direct knowledge of the withdrawal of the secret profits made at the time of the organization of the company, knowledge of the fraud is imputed to the corporation and to the stockholders as of the time of its commission. But where the corporation and its board of directors is under the domination of those who committed the original fraud, the corporation is deemed to be without legal capacity either to know or act in relation thereto, and during such period the statute of limitations does not run, at least against an innocent stockholder.¹⁰ And where the corporation was under the con-

6. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243 (holding the price at which they were being subscribed at the time is sufficient evidence to justify finding of value).

7. *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600.

8. *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341. See § 263 et seq., *infra*.

9. *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189

Pac. 341 (holding that the word "discovery" in this connection embraces not only knowledge of the facts constituting the fraud, but knowledge of such facts as would put a prudent man on inquiry). See LIMITATIONS OF ACTIONS.

10. *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341, per Nourse, J.

Where the defendants are in complete control, or at least the most important factors in the corporation, it cannot be charged with having information of the fraud, so that discovery would relate in

trol of defendant promoters, a delay in bringing the action until a new board of directors could be elected is not such laches as will bar the suit against them.¹¹

§ 111. Liability of Corporation.—A corporation cannot be held liable for the acts of its promoters nor be obligated by their conduct and contracts, in the absence of charter provisions therefor, or of the adoption of such conduct or contracts by the corporation after it comes into existence.¹² The reason for this rule is that the promoters are not the corporation and their contracts cannot be its contracts;¹³ and this is so, although they become at the creation of the corporation its only stockholders, directors and officers.¹⁴ Moreover, the knowledge of a promoter is not knowledge to the corporation thereafter formed through his efforts.¹⁵ This is so, it has been said, upon the obviously correct theory that a corporation cannot, any more than can an individual, have agents or enter into contractual relations until it is actually in being as a thing apart from its pro-creators. Until it is organized, it has no being, franchises or faculties, and those engaged in bringing it into being have no power to bind it by contract, unless so authorized

advance of actual discovery of the facts. Until there is a really free and independent board of directors, the corporation will not be charged with a discovery in advance of actual knowledge; *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243.

11. *Ex-Mission Land & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600.

12. *Biggart v. Lewis*, 183 Cal. 660, 192 Pac. 437. See *infra*, § 112, as to adoption or ratification of promoter's agreement. See note, 17 A. L. R. 452-458, as to liability of corporation on contracts of promoters.

13. *Biggart v. Lewis*, 183 Cal. 660, 192 Pac. 437; *Hawkins v. Mansfield Gold Min. Co.*, 52 Cal. 513; *Morrison v. Gold Mountain etc. Min. Co.*, 52 Cal. 306; *Chater v. San Francisco etc. Refining Co.*, 19 Cal. 219.

14. *Biggart v. Lewis*, 183 Cal. 660, 192 Pac. 437; *Scadden Flat etc. Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440.

15. *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691.

by the charter.¹⁶ Nor is the corporation liable for torts of individuals before it had any corporate existence.^{16a}

§ 112. Ratification of Promoter's Agreement.—After a corporation comes into existence and operation, it may, by adopting arrangements made for it in advance, make them its contracts precisely as it might make similar contracts had no previous engagement been entered into; and there can be no difference between making a contract by adopting an agreement tentatively made for it in advance by promoters and making of an entirely new contract.¹⁷ And a corporation may be bound to fulfill a contract made in its name and in anticipation of its existence by accepting the benefits thereof.¹⁸ Thus the corporation by securing a deed from the vendor of property contracted for by the promoter and making arrangements as to payment with knowledge of the promoter's contract becomes liable according to the terms of the contract.¹⁹ But the failure of the incorporators to take steps to have the corporation adopt their agreements cannot make it liable for agree-

16. *Biggart v. Lewis*, 183 Cal. 660, 192 Pac. 437. See *Rideout v. National Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192, holding that a finding that money was expended by the plaintiff at the request of the corporation is not supported by evidence showing that it was a debt of the promoters.

16a. *Berry v. San Francisco and North Pac. Co.*, 50 Cal. 435.

17. *Scadden Flat etc. Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440. See *AGENCY*, vol. 1. p. 766.

18. *Scadden Flat etc. Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440; *Nannizzi v. Caprile*, 30 Cal. App. Dec. 135, 185 Pac. 673 (a promoters' agreement may be binding on the promoters and good as an offer to a corporation to become binding

upon it upon its acceptance of its benefits, even though the corporation commissioner might never give his permission for the issuance of the stock); *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70. See *infra*, §§ 166, 167, as to adoption of subscription agreements made prior to incorporation.

19. *Jones v. Allert*, 161 Cal. 234, 118 Pac. 794. See *Whitley v. Bradley*, 13 Cal. App. 720, 110 Pac. 596, raising the point but not deciding as to whether property acquired for the purposes of a corporation to be subsequently organized ipso facto inures with all its rights and advantages to such corporation upon its formation without formal transfer of the property to the corporation.

ments which it never made, or as to which it never accepted any benefits.²⁰ To render a corporation liable for the debts of promoters, it must be shown that there was an actual ratification or some affirmative act from which ratification may be inferred. Ratification will not be presumed even where the corporation has received the benefits, unless actual knowledge of the specific contract out of which the benefits arose is made to appear.¹

VI. BY-LAWS AND RECORDS.

By-laws.

§ 113. **Definition and Purposes.**—The term “by-law” has a well known, but limited and peculiar meaning. It is used to designate those regulations which, as one of its legal incidents, a corporation is empowered to make² for its internal government³ or, as it is expressed in the code “for the management of its property, the regulation of its affairs, and for the transfer of its stock.”⁴ Hence, the by-laws may provide for the control of officers and agents⁵ or they may regulate the conduct and prescribe the rights and duties of members toward the corporation and among

20. *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834.

1. *Rideout v. National Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192; *Greene v. Osceola Mines etc. Co.*, 3 Cal. App. 427, 86 Pac. 733 (holding as to sums advanced for the acquirement and development of property agreed to be conveyed to a corporation by the promoters, that the corporation cannot be held liable even though it credits the promoter with such sums and executes a note therefor, and for those sums expended prior to the promoter's agreement). As to rati-

fication of agent's acts generally, see *AGENCY*, vol. 1, p. 766.

2. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

3. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

4. Civ. Code, § 354, subd. 6. See *infra*, § 119, as to contents of by-laws.

5. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

themselves in reference to the management of its affairs⁶ by virtue of their membership in the same corporate body.⁷ But the by-laws of a corporation are no part of its charter.⁸ By section 301 of the Civil Code every corporation organized under the general corporation laws, regardless of its character, must adopt by-laws. And the fact that a corporation is not organized for profit does not prevent it from having a code of by-laws for its government.⁹ Where, by special statute, the powers of directors are to be exercised to the extent only as provided in the by-laws, they have no powers whatever until the stockholders have adopted by-laws.¹⁰

§ 114. Power to Enact in General.—The authority to enact by-laws is frequently given by the charter of the corporation or by some general law; but this authority does not depend upon such declaration, and in the absence of some positive legislative restriction,¹¹ it is a right which is inherent in and incident to every corporation.¹² Thus, where the statute is silent in this respect, the election of directors, like the election or appointment of officers, would be subject to the regulation and control of the corporation;¹³ and the right of voting by proxy may be conferred through a by-law adopted by a majority of stock-

6. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

7. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271.

8. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

9. *Waterbury v. Temescal Water Co.*, 11 Cal. App. 632, 105 Pac. 940.

10. *Hall v. Crandall*, 29 Cal. 567,

89 Am. Dec. 64. See, also, *Forbes v. San Rafael Turnpike Co.*, 50 Cal. 340 (as to whether acts prior to enactment of by-laws are entirely void).

11. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

12. Civ. Code, § 351, subd. 6; *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

13. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

holders.¹⁴ The legislature may, of course, prescribe the formalities to be observed in the enactment of by-laws, and may limit the scope and subjects for which they may be enacted; but in the absence of any such restriction, the propriety or character of the by-laws is to be determined by the corporation itself,¹⁵ subject always to the condition that they must be reasonable and not contravene or be inconsistent with its charter or existing law.¹⁶

§ 115. Adoption of Code of By-laws.—A corporation is required, within one month after filing its articles of incorporation, to adopt a code of by-laws for its government;¹⁷ but no penalty is provided for failure to adopt within such time,¹⁸ and it has been held that a delay in filing a copy of the by-laws with the county clerk for several years after their adoption does not render them void or illegal.¹⁹ Sections 301, 303 and 304 of the Civil Code declare the law of California as to the method of adopting by-laws.²⁰ To pass by-laws and make them effective, the consent of all parties, as in the case of a contract, is not necessary.¹ When they are adopted originally² they may be adopted at a meeting by the assent of stockholders representing a

14. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225 (holding that if statute did not extend the right of voting by proxy at a meeting to create a bonded indebtedness under Civil Code, § 359, a by-law might properly confer such right). See *infra*, §§ 291, 292.

15. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029 (inherent right is broad enough to include right to enact a by-law providing that unpaid balance on stock shall be subject to call).

16. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029. See *infra*, § 120.

17. Civ. Code, § 301.

18. See Civ. Code, § 358, as to a failure to organize after incorporation; and see, also, *supra*, § 56, and *infra*, § 645.

19. *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530 (under Civil Code, § 653e (relating to the by-laws of co-operative business associations)).

20. *Powers v. Marine Engineers Beneficial Assn.*, 35 Cal. App. Dec. 99, 199 Pac. 353.

1. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

2. *Powers v. Marine Engineers Beneficial Assn.*, 35 Cal. App. Dec. 99, 199 Pac. 353.

bare majority of the subscribed capital stock,³ or by a majority of members if there be no capital stock. They may likewise be adopted by written assent of stockholders or members, but in such case a two-thirds assent is required. Where the code of by-laws is adopted at a meeting of stockholders, rather than by written assent, the meeting must be called for that purpose by published notice,⁴ the procedure being the same as for the call of the annual meeting of stockholders by publication of notice.⁵ But a code of by-laws prepared and adopted by signature of stockholders before the creation of the corporation is not adopted in the manner provided by law, since the statute provides for adoption of by-laws *after* the organization of the company.⁶ Ordinarily, there is no requirement for subscribing the by-laws, although such provision is made in special cases, as, for instance, in respect to co-operative business associations.⁷ And stockholders are bound by the by-laws even though they do not sign.⁸ Where subscribed by the stockholders, however, the by-laws may operate as a contract.⁹

In view of the express provisions of the code regarding the adoption and amendment of by-laws, it cannot be held that custom or usage, consisting in repeated compliance with the provisions of a by-law admitted invalid at its adoption, can take the place of compliance with the statutory requirements. To permit usage or custom to make a by-law would, it has been said, be in violation of the clear requirements of the statute, and as a result, by-laws, instead of being express, formally adopted, in writing and

3. Civ. Code, § 301; *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

4. Civ. Code, § 301.

5. See *infra*, § 279.

6. *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375.

7. See Civ. Code, § 653e; *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

8. *McFadden v. Board of Supervisors of County of Los Angeles*, 74 Cal. 571, 16 Pac. 397.

9. See § 123, *infra*.

open to the public, would depend for proof of their existence upon the uncertainties and infirmities of oral testimony. No case goes to the length of holding that a by-law may be created or adopted by usage, where statutory provisions such as the code provisions exist. A by-law must conform, at least substantially, to the express provisions of the statute.¹⁰

§ 116. In Whom Power Vested.—In California the power is vested in the stockholders to adopt by-laws,¹¹ and to repeal or amend or adopt new by-laws.¹² The same authority that enacts a by-law may ordinarily repeal it.¹³ However, by code provision, the power to repeal and amend and to adopt new by-laws may be delegated to the board of directors by the same vote or assent required for the stockholders themselves to repeal, amend or adopt. And this power when so delegated to the directors may be revoked by a similar vote at any regular meeting of the stockholders or members.¹⁴

§ 117. Amendment, Repeal or Revision.—The by-laws may be repealed or amended, or new by-laws may be adopted, at the annual meeting, or at any other meeting of the stockholders or members, called for that purpose by the directors, by a vote representing two-thirds of the subscribed stock, or by two-thirds of the members. But the written assent of the holders of two-thirds of the stock, or two-thirds of the members, if there is no capital stock, is likewise effectual to repeal or amend any by-law or to adopt additional by-laws.¹⁵ An alteration of a by-law is

10. *Powers v. Marine Engineers Ben. Assn.*, 35 Cal. App. Dec. 99, 199 Pac. 353, per Kerrigan, J. See *infra*, § 118, as to parol proof of by-law.

11. Civ. Code, § 301.

12. Civ. Code, § 304.

13. *Underhill v. Santa Barbara Land etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

14. Civ. Code, § 304.

15. Civ. Code, § 304; *Powers v. Marine Engineers Beneficial Assn.*, 35 Cal. App. Dec. 99, 199 Pac. 353.

pro tanto a repeal. It is but the making of another by-law upon the same matter.¹⁶ And where a revision of the by-laws is made and new provisions are submitted to the stockholders, adopted and declared to be the by-laws of the corporation, with no suggestion that the new provisions are merely amendatory of the former by-laws, it cannot be contended that the original by-laws are continued in force.¹⁷ The power to alter by-laws, however, has the same limit as has the making of by-laws, namely, they must be reasonable and not inconsistent with the constitution and the laws of the state. Hence, a power reserved to alter, amend or repeal is a power reserved to pass only reasonable by-laws agreeable to law; and in this respect it matters not that the power to make and alter is expressly given and the by-law passed in due form.¹⁸

§ 118. Record or Evidence of By-laws.—All by-laws adopted must be certified by a majority of the directors and the secretary of the corporation and be copied in a legible hand into a book kept in the office of the corporation and known as the book of by-laws.¹⁹ The law provides that this book must then be open to the inspection of the public during office hours of each day, except holidays.²⁰ Where an amendment or new by-law is adopted it must be copied into the book of by-laws with the original by-laws and immediately after them; and if a by-law is repealed, the fact of repeal with the date of the meeting at which the repeal was enacted, or written assent was filed, must be also stated. Until copied or stated, as

16. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271.

17. *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059.

18. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271. See *infra*, § 120, as to validity and construction of by-laws in general.

19. Civ. Code, § 304; *Powers v. Marine Engineers Ben. Assn.*, 35 Cal. App. Dec. 99, 199 Pac. 353.

20. Civ. Code, § 304; *Chapman v. Doray*, 89 Cal. 52, 26 Pac. 605; *Powers v. Marine Engineers Ben. Assn.*, 35 Cal. App. Dec. 99, 199 Pac. 353.

required, no by-law nor any amendment or repeal thereof can be enforced against any person, other than the corporation, not having actual notice thereof.¹ The code provisions regarding the effectiveness of the by-laws or of amendments or repeals, where not recorded, were enacted, it has been declared, so that if duly passed they might be treated as enforceable against the corporation and persons having notice thereof, regardless of whether or not they have been copied into the proper book.² Before such change in the statute, by-laws adopted but not certified and copied as required did not take effect or have any validity.³ But by-laws which have been copied into the record book and acted on as such are admissible in evidence without proof of any direct vote of the members in adopting them.⁴ It has been said that the existence of a by-law may be shown by proof of custom, or by acts of acquiescence of the members of the corporation, or by the uniform procedure of the corporation; but the import of the cases is not so much that the custom may take the place of a by-law, as that it may be resorted to as evidence of adoption.⁵

§ 119. Contents of By-laws.—Under section 303 of the Civil Code a corporation may, by its by-laws, where no other provision is specially made, provide for: (1) the time, place and manner of calling and conducting its meetings, and may dispense with notice of all regular meetings of stockholders or directors;⁶ (2) the number of stockholders or members constituting a quorum;⁷ (3) the

1. Civ. Code, § 304.

2. Code Commissioner's note to Civ. Code, § 304, amendment of 1905.

3. *Bank of National City v. Johnston*, 6 Cal. Unrep. 418, 60 Pac. 776. Cf. *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530 (regarding the validity of by-laws of busi-

ness associations not filed with the county clerk as required by law).

4. *Baker v. Ducker*, 79 Cal. 365, 21 Pac. 764 (religious corporation).

5. *Powers v. Marine Engineers Ben. Assn.*, 35 Cal. App. Dec. 90, 199 Pac. 353.

6. See *infra*, § 274 et seq.

7. See Civ. Code, § 312; and see *infra*, § 284.

mode of voting by proxy;⁸ (4) the qualifications and duties of directors, and also the time of their annual election, and the mode and manner of giving notice thereof;⁹ (5) the compensation and duties of officers;¹⁰ (6) the manner of election and tenure of office of all officers other than the directors; and, (7) suitable penalties for violations of by-laws, not exceeding in any case one hundred dollars for any one offense; (8) the newspaper in which all notices of the meetings of stockholders or board of directors, notice of which is required, shall be published.^{10a}

By enumerating in this code section certain matters upon which by-laws may be enacted, the legislature has not limited the authority of corporations to make by-laws, which they would have as an incident inherent in their creation and irrespective of such legislation.¹¹

§ 120. Validity and Construction in General.—The power to make by-laws, even where unrestricted by statute,¹² is subject to the condition that they must not be unreasonable in their practical application;¹³ and they must not contravene or be inconsistent with the provisions of the charter,¹⁴ or with the constitution,¹⁵ or any existing law of

8. See *infra*, §§ 291, 292.

9. See *infra*, § 279, as to notice of annual meeting and election; *infra*, § 280, as to time of holding annual meeting; *infra*, §§ 416, 417, as to qualification of directors.

10. See *infra*, § 459 et seq., as to compensation.

10a. The eighth subdivision of § 291, *Corporations*, also specifies the qualifications of the newspaper in which publication may be made.

11. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029. See *supra*, § 14, as to inherent power to enact by-laws.

12. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

13. *Riverside Land Co. v. Jarvis*,

174 Cal. 316, 163 Pac. 54; *Caldwell v. Grand Lodge*, 148 Cal. 195, 113 Am. St. Rep. 219, 7 Ann. Cas. 356, 2 L. R. A. (N. S.) 653, 82 Pac. 781; *People's Home Savings Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452; *Garrett v. Garrett*, 31 Cal. App. 173, 159 Pac. 1050; *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

14. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

15. Civ. Code, § 301; *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac.

<See "Gentium",
1926 Supp. 476>

the state.¹⁶ Moreover, a by-law must not contravene public policy,¹⁷ nor, it has been said, may a by-law be inconsistent with the general principles of the law of the land, which are to be determined by the courts when a case is properly before them.¹⁸ The alteration of a by-law is upon the same conditions.¹⁹ A by-law, therefore, may not impair rights which have been given and become vested by virtue of a by-law repealed by it or by contract with the corporation.²⁰ So far as a by-law is inconsistent with statutory provisions, it must yield,¹ and the fact that similar corporations have a by-law of similar import does

441; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

16. Civ. Code, § 354, subd. 6; *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Spurgeon v. Santa Ana Valley Irr. Co.*, 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140 (concurring opinion of Temple, J.); *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; *People's Home Savings Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452 (the substantial rights of stockholders under the law cannot be taken from them or even abridged by the by-laws); *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359; *Garrett v. Garrett*, 31 Cal. App. 173, 159 Pac. 1050; *Bennett v. Modern Woodmen*, 35 Cal. App. Dec. 139, 199 Pac. 343; *Powers v. Marine Engineers Ben. Assn.*, 35 Cal. App. Dec. 99, 199 Pac. 353 (holding that a by-law is invalid

which is in contravention of law when made, despite the fact that the law is subsequently amended so that such a by-law could be passed); *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

17. *Caldwell v. Grand Lodge*, 148 Cal. 195, 113 Am. St. Rep. 219, 7 Ann. Cas. 356, 2 L. R. A. (N. S.) 653, 82 Pac. 781; *Bennett v. Modern Woodmen*, 35 Cal. App. Dec. 139, 199 Pac. 343.

18. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271.

19. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271. See *Caldwell v. Grand Lodge*, 148 Cal. 195, 113 Am. St. Rep. 219, 7 Ann. Cas. 356, 2 L. R. A. (N. S.) 653, 82 Pac. 781.

20. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271. See **MUTUAL BENEFIT SOCIETIES.**

1. *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 411; *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375.

not affect the question of its invalidity.³ A by-law will be construed, therefore, in connection with the provisions of the statute so as to conform thereto where possible,³ and in such a way as to give it as reasonable operation and effect as possible.⁴ A by-law will not be construed so as to hamper the directors and officers by extending it to transactions not actually covered in it, but, where possible, will be held merely permissive and not a limitation upon other powers.⁵

2. *People's Home Savings Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359.

3. *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441, holding provision that a call on unpaid stock could be made only by two-thirds vote of all stock issued and outstanding was to be construed in connection with provisions of statute for benefit of creditors permitting assessment to be levied by directors, and holding such provision to have reference only to such call as might ordinarily, in the absence of contrary stipulation in contract of subscription, be made by directors by simple resolution to that effect.

4. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15 (construing by-law providing that no mortgage or conveyance should be made without consent of holders of two-thirds of outstanding stock as not applicable to a lease).

5. *E. W. McLellan Co. v. East San Mateo Land Co.*, 166 Cal. 736, 137 Pac. 1145 (by-laws referring to making of contracts in writing not extended to include oral contract); *Seal of Gold Min. Co. v. Slater*, 161

Cal. 621, 120 Pac. 15 (where question was raised, but not decided, whether a by-law requiring consent of stockholders to mortgage or make a conveyance would be in conflict with provisions of section 305, Civil Code, vesting the exercise, conduct and control of corporate powers, business and property in the board of directors); *McCormick v. Stockton etc. R. Co.*, 130 Cal. 100, 62 Pac. 267 (by-law providing that notes and obligations signed officially by president and secretary should be binding on corporation held not to require secretary to sign all notes and obligations); *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289 (by-law providing that president should sign all certificates of stock and other contracts and instruments in writing which had been first approved by the board of directors held not to be a limitation on the power of the directors to invest the president with authority to do other things); *Freyberg v. Los Angeles Brewing Co.*, 4 Cal. App. 403, 88 Pac. 378 (by-law relating to mode of executing contracts in writing does not restrict the power of officer to making of contracts in writing).

§ 121. Validity of Particular By-laws.—Where the legislature has prescribed the conditions which shall govern as to certain specific by-laws, the corporation has no power to annex other conditions which are inconsistent with those so prescribed.⁶ Thus, since a transfer of shares of stock by delivery is valid as to the parties,⁷ a by-law cannot create a lien on stock for unpaid indebtedness of a stockholder, which will adhere to it in the hands of a bona fide purchaser for value and without notice.⁸ But the language of section 324 of the Civil Code does not forbid the making of agreements that certificates shall pass with the transfer of certain other property. That provision merely prescribes a mode by which the transfer may be made and does not prohibit a transfer by other methods, so long as they are not unreasonable or inconsistent with the statute.⁹ Following the rule first above stated, a corporation may not pass a by-law giving or taking away the power of electing directors which has been lodged by statute in the hands of the stockholders.¹⁰ And a by-law asserting that stockholders are not to be held to their constitutional liability clearly contravenes the constitution and laws of the state and is void.¹¹ Again, a by-law permitting a stockholder to with-

6. See cases cited *infra*.

7. See Civ. Code, § 324.

8. *Lankershim etc. Water Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134; *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359. See *People v. Crockett*, 9 Cal. 112, where the point was raised but not determined.

9. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54 (holding a by-law, which had been adopted prior to the amendment to section 324 permitting by-laws to make stock appurtenant to the land in the

case of water companies, providing that the stock in the company should pass with the land, to be valid).

10. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. See *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012, holding that a by-law may confer upon an election committee consisting of certain of the officers of the company full discretion as to fixing the period of time necessary to enable the stockholders to vote their stock.

11. *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090.

draw his capital from the corporation is in contravention of section 309 of the Civil Code and is invalid.¹²

Since, under section 303 (subdivision one), a corporation is given the right to adopt by-laws dispensing with notice of regular meetings of stockholders, the statutes providing for giving notice of such meetings is the general rule only until the corporation has taken advantage of the provisions of section 303 for the adoption of a by-law covering the same matter in a different manner.¹³ And although under section 303 of the Civil Code, the exercise of the right to vote by proxy may be regulated by a by-law as to preliminary requirements, as, for instance, that the authorization must be in writing, properly witnessed, acknowledged or filed with the records, the power is not given to qualify or limit the right itself, and certainly not to nullify it. Hence it has been held that a requirement that a proxy can be voted only by a stockholder is in contravention of law,¹⁴ and a limitation of the life of a proxy to thirty days has been held to be unreasonable.¹⁵

§ 122. Retrospective Operation.—A by-law, like a statute, will not be construed as intended to operate retrospectively, unless express provision is found therefor in its terms. And if its language is such that by giving it a retrospective operation it would have the effect to annul or impair an existing obligation, it will be held unreasonable and in contravention of existing laws.¹⁶ Thus, the by-

12. *Verconters v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375.

13. *Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177.

14. *People's Home Savings Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452.

15. See *Saline Valley Salt Co. v. White*, 177 Cal. 341, 170 Pac. 320,

where, although the question was not decided by the supreme court, the district court of appeal in language quoted in the opinion of the supreme court held such a provision unreasonable. As to stockholders voting by proxy, see *infra*, §§ 291, 292.

16. *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271.

laws of a mutual benefit society, which constitute part of its contract with its members,¹⁷ cannot be changed to impair the original contract without the consent of all the parties.¹⁸ Even where the power to alter the by-laws is reserved and is thus a part of the contract, the change cannot be made retroactive so as to impair the obligation.¹⁹ And in the case of an ordinary corporation a by-law cannot have a retrospective operation upon a transfer of stock, since it is a vested property right.²⁰

§ 123. By-law as a Contract.—Although the articles and by-laws of the corporation, together with the certificate, constitute evidence of a contract between the parties,¹ and although the by-laws are often said to constitute a contract between the stockholders of the corporation,² nevertheless, a by-law fixing the time for a directors' meeting is not a "law or contract" within the meaning of section 11 of the Civil Code, providing for the performance of certain acts when the time of their performance falls on a holiday.³ Although a by-law which contravenes the constitution and laws of the state is unenforceable as such against non-

17. See **MUTUAL BENEFIT SOCIETY**.

18. *Richter v. Supreme Lodge Knights of Pythias*, 137 Cal. 8, 69 Pac. 483; *Hogan v. Pacific Endowment League*, 99 Cal. 248, 33 Pac. 924; *Stohr v. San Francisco etc. Fund Soc.*, 82 Cal. 557, 22 Pac. 1125; *Schack v. Supreme Lodge of Fraternal Brotherhood*, 9 Cal. App. 584, 99 Pac. 989.

19. *Hogan v. Pacific Endowment League*, 99 Cal. 248, 33 Pac. 924; *Wiese v. San Francisco Musical Soc.*, 82 Cal. 645, 7 L. R. A. 577, 23 Pac. 212; *Stohr v. San Francisco etc. Fund Soc.*, 82 Cal. 557, 22 Pac. 1125.

20. *People v. Crockett*, 9 Cal. 112.

1. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54.

2. *Saline Valley Salt Co. v. White*, 177 Cal. 341, 170 Pac. 820; *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

3. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Saline Valley Salt Co. v. White*, 177 Cal. 341, 170 Pac. 820, holding that although the by-laws are not within the term "law or contract" as so used, an act provided to be done under the by-laws is within a statute permitting acts "agreed to be done" on a particular day to be performed on the next business day, where the particular day is a holiday.

assenting stockholders, it may, nevertheless, if assented to, and is not opposed to public policy,⁴ be enforced as a contract, even though it is invalid as a by-law because unreasonable,⁵ or not properly adopted,⁶ or violative of statutory rights,⁷ or obligations.⁸ The reason for this is that a man may part with a right voluntarily, although it would be unjust to deprive him of such right by a by-law passed without his assent or knowledge.⁹

§ 124. Persons Bound by By-laws.—A stockholder is bound by the articles of incorporation and by-laws duly adopted under section 301 of the Civil Code, whether he has signed them or not;¹⁰ and a stockholder has, in turn, the right to rely on the observance by the corporation of its own by-laws and the laws of the state in the transaction of its business.¹¹ But where notice of a by-law is material, it must be proved against stockholders and agents, as well as against strangers, by direct or presumptive evidence, and cannot be imputed by an

4. *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090 (where the provision was not signed); *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375; *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887; *Lankershim Ranch Land etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134; *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

5. *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887.

6. *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375.

7. *Lankershim Ranch Land etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134; *Jennings v. Bank of Cali-*

fornia, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852.

8. *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090.

9. *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852.

10. *McFadden v. Board of Supervisors of County of Los Angeles*, 74 Cal. 571, 16 Pac. 397. See *supra*, § 115.

11. *Taft v. Presidio etc. R. Co.*, 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436 (holding that stockholder might hold corporation liable for conversion of his stock for permitting transfer and cancellation of stock other than in accordance with the provisions of the by-laws).

arbitrary rule of law.¹² In cases where by-laws become a part of the contract of a stockholder with the corporation, of course he is held to strict notice of their contents, whether valid simply as a by-law or not.¹³ But by-laws are of no binding force upon third persons having no knowledge of them,¹⁴ as where a lien on the stock is sought to be created by a by-law which would bind future purchasers without notice of it;¹⁵ and the fact that many similar corporations have such a by-law does not give notice of its existence to such purchasers.¹⁶ By-laws ordinarily regulate the powers and duties of officers, and, where there is no question of estoppel or ratification, such by-laws are admissible to show whether transactions have been executed by the authority of the corporation.¹⁷ Against an employee, the by-laws are admissible to show what his duties are and to determine whether he has properly and fully performed them.¹⁸ When the provisions of the by-laws are actually known to an officer, they enter into and become a part of his contract of employment.¹⁹

§ 125. Waiver.—Generally speaking, a by-law is for the benefit of the corporation alone,¹ and the same authority

12. *Underhill v. Santa Barbara Land etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

13. *Supreme Lodge of Fraternal Brotherhood v. Price*, 27 Cal. App. 607, 150 Pac. 803. See *supra*, § 124. See **MUTUAL BENEFIT SOCIETIES**.

14. *Newton v. Johnston Organ etc. Mfg. Co.*, 180 Cal. 185, 180 Pac. 7; *Doolittle v. Savage Tire Co.*, 33 Cal. App. 476, 165 Pac. 728 (where third person was a stockholder at time of trial, but not when contract with corporation was made).

15. See *supra*, § 121.

16. See *supra*, § 120.

17. *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981; *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324.

18. *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128. See *Humboldt Sav. & L. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920 (sureties should look to by-laws for duties of officer).

19. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; *Barstow v. City R. Co.*, 42 Cal. 465 (relevant evidence as to how the parties understood each other).

1. *Underhill v. Santa Barbara Land, etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

which enacted it² may either repeal³ or waive it. Thus, if a course of action contrary to a by-law is acquiesced in by the stockholders, the by-law is waived and will not affect the rights of third persons dealing with the corporation in good faith, even though such persons are stockholders, provided they have no actual notice.⁴ And a by-law, such as one governing the transfer of stock, which is for the benefit of the corporation, may be waived by the corporation for whose protection it is made, by making the transfer. The effect of such a waiver cannot be subsequently obviated.⁵ So noncompliance with a by-law is rendered immaterial where the persons owning and controlling the stock agree upon a course of action not in conformity with the by-law.⁶ On like principle, where all of the stockholders assent to the holding of a meeting in violation of the by-laws, they are bound by the transactions of the meeting.⁷

Records.

§ 126. In General.—The books, records and papers of a corporation are private property, not open to inspection by strangers,⁸ except, however, the by-laws which are by an express provision open to public inspection.⁹ Although in some states the stock and transfer book is a public record, accessible to all persons and intended to give notice to everybody of the ownership of the stock, in California, this is not the law; only stockholders and creditors of the cor-

2. See *supra*, § 114 et seq., as to power to enact.

3. See *supra*, § 117.

4. *Underhill v. Santa Barbara Land etc. Co.*, 93 Cal. 300, 28 Pac. 1049. See *supra*, § 112, as to ratification.

5. *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

6. *Hyman v. Karl Stern Co.*, 32 Cal. App. Dec. 314, 191 Pac. 47.

7. *Ellsworth v. National Home etc. Builders*, 33 Cal. App. 1, 164 Pac. 14.

8. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Stowe v. Harvey*, 241 U. S. 199, 60 L. Ed. 953, 36 Sup. Ct. Rep. 541, see, also, *Rose's U. S. Notes*.

9. See Civ. Code, § 304, and *supra*, § 118.

poration, not the world generally, have access to the books.¹⁰ As to the books of a corporation a different rule should, it is said, be applied than that which is applied to the books of a party to litigation producing them to serve his own purposes and to aid his own claim, since the records of business transactions are required by law to be kept by all corporations for profit.¹¹ And so, when produced as the regularly kept and original books of the corporation, identified as such by their proper custodians,¹² they are admissible as competent evidence against it as admissions.¹³ Thus, a resolution of the board of directors is an admission by it which it is competent to make,¹⁴ and the record of the proceedings of the corporation may be sufficient as an admission to take a case out of the statute of limitations.¹⁵ Books and records which are purely corporate in their nature are of two kinds, stock records and minutes, although in addition the law requires the corporation to keep books in which shall be recorded the amount of its assets and liabilities and the names and place of residence of its officers,¹⁶ and a record in general of all business transactions, embracing every act done or ordered to be done.¹⁷ Papers or records which have been lost or destroyed by conflagration or other public calamity may be restored by proper proceedings.¹⁸ The

10. See Civ. Code, §§ 377, 378, as to persons entitled to inspect records; *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676 (holding that a creditor of an individual stockholder had no access to the books under Civil Code, sec. 378, and therefore had no notice of their contents). As to public access to certain records of banks, see *BANKS*, vol. 4, p. 92.

11. *Hurwitz v. Gross*, 5 Cal. App. 614, 91 Pac. 109.

12. *City Sav. Bank v. Enos*, 135

Cal. 167, 67 Pac. 52; *Neilson v. Crawford*, 52 Cal. 248.

13. *Lawrence v. Premier Indemnity Assur. Co.*, 180 Cal. 688, 182 Pac. 431; *Neilson v. Crawford*, 52 Cal. 248. And cases cited *infra*.

14. *Smith v. Woodville etc. Min. Co.*, 66 Cal. 398, 5 Pac. 688.

15. *Dearborn v. Grand Lodge, A. O. U. W.*, 138 Cal. 658, 72 Pac. 154.

16. Const., art. XII, § 14.

17. Civ. Code, § 377.

18. Civ. Code, § 365. See *infra*, § 162, as to procedure for issuance of duplicate certificates of stock.

rules concerning the admissibility of books and records of a corporation, are the same in general as those relating to those of other persons.¹⁹

§ 127. Stock Records.—All corporations, other than religious, educational or benevolent, must keep in an office in California books in which are recorded the amount of capital stock subscribed, and by whom;²⁰ the names of the owners of stock with the amounts owned by them respectively; the amount of stock paid in and by whom; and the transfers of stock.¹ There must be kept a book known as the "stock and transfer book," which must contain a record of all stock; the names of the stockholders or members, alphabetically arranged; installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom.² The keeping of the stock records required by the statute enables the holder or purchaser to trace his shares back to the original issue and to ascertain the facts concerning assessments levied at any time upon his stock.³ Such books are competent evidence and sufficient prima facie evidence of the facts shown by the entries therein of the

19. See *infra*, § 128, as to effect of corporate records as evidence; and, generally, see EVIDENCE.

20. Const., art. XII, § 14. But see *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047, in which the court stated that the code did not require that there should be a subscription book.

1. Const., art. XII, § 14.

2. Civ. Code, § 378; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047, holding that it is not necessary that the book should be named as in the code.

The stock and transfer book, rather than any statements of the secretary in the minutes, is the source

from which is to be ascertained the amount of outstanding stock as well as the names of the several stockholders and the amount held by each; *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889. And so the court may, from the stock and transfer book itself, properly correct the testimony of the secretary whose knowledge has been derived only from the books. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542.

3. *Craig v. Hesperia Land etc. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10. See *infra*, § 243 et seq., as to right of stockholder or member to inspect records.

number of shares held by a stockholder.⁴ The fact that the books are kept by the assistant secretary, who acts in that capacity in keeping them and making entries therein, is immaterial; it is obvious that they have the same sanction as if the secretary personally made the entries.⁵

§ 128. Effect of Corporate Records as Evidence.—The books and records of a corporation are admissible in evidence and entitled to weight, but they are not conclusive, so as to preclude any showing supplementing or counter-acting such evidence.⁶ There is no conclusive presumption that the corporation has complied with the provisions of section 14 of article XII of the constitution, which requires certain books to be kept by it. Failure to perform such duty on the part of the corporation cannot be imputed to the owner of stock who has a right to assume that the proper book entries are made; and no duty devolves upon him to see that the proper entries have been entered in the books.⁷ Thus, an entry in the minutes is not conclusive as against creditors,⁸ nor against parties who have not con-

4. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047. See *infra*, § 128, as to corporate records as evidence generally.

5. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047.

6. *Lawrence v. Premier Indemnity Assur. Co.*, 180 Cal. 688, 182 Pac. 431; *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889 (holding that the recorded statement of the secretary of a meeting of the amount of stock held by a stockholder at the meeting must yield to evidence derived from the stock and transfer book or to testimony of the stockholder himself, the amount of his stock being a matter peculiarly within his knowledge, though subject to be overcome by production of the stock book; but in the absence of

evidence therefrom, his testimony will prevail over the unsupported recital of the secretary in the minutes); *Mudgett v. Horrell*, 33 Cal. 25; *Hygenic Health Food Co. v. Gran*, 36 Cal. App. Dec. 241, approved in 62 Cal. Dec. 581, 63 Cal. Dec. 189, 202 Pac. 653.

There is no principle of law or provision of statute under which such records are to be regarded as conclusive evidence of the facts therein stated; *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

7. *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

8. *Home Sav. Bank v. Los Angeles etc. Realty Co.*, 176 Cal. 731, 171 Pac. 290 (entry indicating that stock has been fully paid up).

tracted with knowledge of the minutes;⁹ and the records in the stock books are not conclusive as to whether one ever accepted stock in a company or became a stockholder thereof.¹⁰ However, corporate books and records are prima facie proof of an act which is an essential predicate of a corporation transaction, such as authority to officers to act;¹¹ and, likewise, they are competent evidence and presumptively correct as to such records as are required to be kept.¹² But the record of corporate action derived from some outside source is not prima facie evidence of that fact and must yield to better testimony or to an authorized record of such fact;¹³ and where a record has no proper place in the corporation books, an effort to prove it is only an effort to prove a self-serving declaration by hearsay.¹⁴ Stockholders are chargeable with knowledge of all acts of the directors which are spread upon the records, as well as all facts connected therewith that inquiry suggested thereby would have disclosed,¹⁵ but the books are not admissible against stockholders as admissions in an action against them by creditors.¹⁶ While it is true that entries in the books are, as a general rule, inadmissible against or binding upon third parties, it has been held that a guarantor of a corporate note, in effect making himself a principal debtor, is not in the position of a third party.¹⁷

9. *Gabriel v. Bank of Suisun*, 145 Cal. 266, 78 Pac. 736.

10. *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248 (holding that though the entries in stock books are presumptively correct, they may be controverted by evidence that the apparent owner did not consent to become a stockholder and that the issuance of stock in his name was unauthorized); *Mudgett v. Horrell*, 33 Cal. 25.

11. *Union Trust Co. v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615.

12. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889 (min-

utes required to be kept under Civ. Code, § 377); *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089 (entries in stock book to prove shares subscribed for and issued at any time).

13. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

14. *Fletcher v. Kidder*, 163 Cal. 769, 127 Pac. 73. See EVIDENCE.

15. *Lady Washington Consol. Co. v. Wood*, 113 Cal. 482, 45 Pac. 809.

16. *Neilson v. Crawford*, 52 Cal. 248.

17. *Union Trust Co. v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615.

§ 129. Minutes in General.—A corporation for profit is required to keep a record of all its business transactions, a journal of all meetings of directors, members or stockholders, with the time and place of holding the same, whether regular or special, and if special, its object, how authorized and the notice thereof given. The record must embrace every act done or ordered done, state who were present and who absent; and if requested by any director, member or stockholder, the time must be noted when he entered the meeting or obtained leave of absence therefrom. On a similar request the ayes and noes must be taken on any proposition and a record thereof made; and on a similar request the protest of any director, member or stockholder to any action or proposed action must be entered in full.¹⁸ Thus, the minute-book would be competent evidence to show the organization of the corporation, its place of business, the nature of the business transacted by it, the meetings of the directors and other matters as to the good faith of the corporation in organizing, upon a question of corporate existence and due organization in an action of quo warranto to declare a forfeiture of corporate rights.¹⁹

§ 130. Proof of Action not Recorded in Minutes.—It is a general rule that a record of corporate acts and resolutions is not essential to their validity,²⁰ and that when the

18. Civ. Code, § 377; *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976 (holding that a list of names and addresses of stockholders prepared by order of the directors was within Civ. Code, § 377); *Hurwitz v. Gross*, 5 Cal. App. 614, 91 Pac. 109.

19. *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 63 Pac. 163.

20. *Pixley v. Western Pac. R. Co.*,

33 Cal. 183, 91 Am. Dec. 623; *Bank of Napa v. Ferguson Burns Estate, Inc.*, 32 Cal. App. Dec. 669, 192 Pac. 66; *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 Pac. 927 (holding that a formal resolution in writing signed by the directors is not necessary where the transaction was actually authorized and ratified); *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871. And cases cited *infra*.

A corporation need not necessarily spread its action upon the

facts and circumstances surrounding a transaction show the existence of proper corporate action, the fact that no record thereof appears in the proper book does not absolutely disprove such action or invalidate instruments executed in accordance therewith.¹ Under such circumstances, a vote of the corporation may be presumed from other acts,² or from the corporate seal.³ And so the parties interested may prove the corporate action by parol though the minutes be entirely silent thereon,⁴ or where there has been a mistake or oversight of the secretary in not making a record of corporate action, or it has been postponed,⁵ or where the record made is faulty or incorrect.⁶ A corporation by failing to enter upon its minutes an order giving to officers authority to act cannot defeat the rights of persons

minutes, if an oral resolution is actually passed; *Boggs v. Lakeport etc. Park Assn.*, 111 Cal. 354, 43 Pac. 1106; *Bank of Napa v. Ferguson Burns Estate, Inc.*, 32 Cal. App. Dec. 669, 192 Pac. 66; *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731. See *infra*, § 443, as to necessity for action by the board as a board duly assembled.

Many, if not in practice most, corporate acts are not made matters of record; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

1. *Schallard v. Eel River Steam Nav. Co.*, 70 Cal. 144, 11 Pac. 590. And cases cited *infra*.

2. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Hamilton v. Bates*, 4 Cal. Unrep. 371, 35 Pac. 304.

3. See *supra*, § 95.

4. *Fowler Gas Co. v. First Nat. Bank*, 180 Cal. 471, 181 Pac. 663 (holding that if minutes are not kept, other parties have the right

to prove by parol what actually occurred at the meetings of the directors, if such proof tends to establish their rights); *Boggs v. Lakeport etc. Park Assn.*, 111 Cal. 354, 43 Pac. 1106; *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871; *Bank of Yolo v. Weaver*, 3 Cal. Unrep. 569, 31 Pac. 160.

Where it appears by credible evidence that the minutes of the board were not kept or recorded, but that a resolution was actually passed, this is sufficient to show authorization by the board of directors; *Martin v. Howe*, 35 Cal. App. Dec. 889 (rehearing in supreme court granted).

5. *Bay View Homestead Assn. v. Williams*, 50 Cal. 353.

6. *Fowler Gas Co. v. First Nat. Bank*, 180 Cal. 471, 181 Pac. 663 (holding that the minutes of a board of directors do not constitute the only evidence admissible for the purpose of showing authority of an officer).

in transactions completed under such ostensible authority,⁷ or prejudice the rights of a party relying upon the good faith of an actual vote of the corporation.⁸

§ 131. Minutes and Parol Evidence Rule.—The function of minutes of a meeting is merely to act as a written record of what took place. That record may be true or it may not be, and in the absence of the element of estoppel, as where a party has acted in justifiable reliance upon the minutes, it is permitted to the corporation or to anyone else to show what actually did take place at the meeting.⁹ At most, it is said, the minutes of the proceedings of the board of directors are only prima facie evidence of its acts.¹⁰ Thus, a corporation may introduce parol evidence to show that a resolution spread upon the minutes of directors' proceedings does not express correctly the proposition voted on by the board;¹¹ and it is permissible to show the full transaction, although but a part of it appears in the minutes.¹² But, in the absence of an issue for that purpose, the corporation will not be permitted to show that its records, upon the faith of which parties have contracted with it and which it has taken no steps to correct, are false.¹³ Provisions in a by-law that the recital of the fact of notice of special meetings and subsequent approval of the minutes shall be conclusive evidence of due notice are intended merely to facilitate proof of regularity of the

7. *Fowler Gas Co. v. First Nat. Bank*, 180 Cal. 471, 181 Pac. 663.

8. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

9. *Lawrence v. Premier Indemnity Assur. Co.*, 180 Cal. 688, 182 Pac. 431.

10. *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

11. *Gilson Quartz Min. Co. v. Gilson*, 51 Cal. 341.

12. *Lawrence v. Premier Indem-*

nity Assur. Co., 180 Cal. 688, 182 Pac. 431.

The testimony of a director that he did not vote is competent to contradict a statement to the contrary in the minutes; *Hygienic Health Food Co. v. Grant*, 36 Cal. App. Dec. 241, approved in 62 Cal. Dec. 581, 63 Cal. Dec. 189, 202 Pac. 653.

13. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594.

meeting, not to limit proof to the minute entries and clerical acts of the secretary.¹⁴

§ 132. Minutes and the Best Evidence Rule.—Testimony showing that the minutes are not a full or true record of what took place at a meeting is to be distinguished from testimony as to the contents of the minutes. Testimony of the latter sort is incompetent, not because it comes within the “parol evidence” rule, but because it is an endeavor to prove the contents of a writing by evidence other than the writing itself, that is, because it is within the “best evidence” rule, which is applicable to proof of the contents of any writing, no matter what its character.¹⁵ The corporate record itself constitutes the best evidence of its contents;¹⁶ and so, its contents cannot be proved by an oral statement where the absence of the record has not been accounted for.¹⁷ And it is said that the books of a corporation furnish the highest and best evidence upon the question of who were the de jure directors, although testimony of individuals is sufficient to establish at least their de facto capacity.¹⁸

§ 133. Production and Authentication of Records.—The right to compel production of corporate records and papers

14. *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289.

15. *Lawrence v. Premier Indemnity Assur. Co.*, 180 Cal. 688, 182 Pac. 431. See EVIDENCE.

16. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889 (where the best evidence of a fact is to be found in another book the record of the secretary in the minutes is no better evidence than the testimony of another person); *Boggs v. Lakeport etc. Park Assn.*, 111 Cal. 354, 43 Pac. 1106 (holding that rough notes or minutes of proceedings kept on slips of paper,

but not recorded in the books, are secondary evidence and admissible only as such); *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542 (holding that court might correct testimony of a secretary derived from the stock records by reference to the book itself); *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343; *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169.

17. *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169.

18. *Reed & Co. v. Harshall*, 12 Cal. App. 697, 108 Pac. 719.

is dependent upon a showing that they contain evidence material to the cause of the party seeking their production.¹⁹ And before the court can acquire any authority to order their production, there must be previously produced some evidence on which the order can properly be predicated.²⁰ Thus in an action against a corporation based on fraud a court has no jurisdiction to make an order requiring the corporation to exhibit its books to plaintiff in order that he may ascertain the names of its stockholders to be substituted in lieu of fictitiously named defendants, where the action in no way involves an issue to obtain disclosure of names and stockholdings of fictitiously designated defendants.¹ A general omnibus order for the production of the corporate books and papers has always been held to be unauthorized,² in the absence of a clear showing that they contained evidence material to the inquiry.³ And even where material, it has not been decided whether a mere officer can be compelled as against the orders of the corporate authorities to produce its books in court.⁴ In order that the records may be admissible in evidence, they must be identified as such by their proper custodians,⁵

19. *Ex parte Clarke*, 126 Cal. 235, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546.

20. *Kullman, Salz & Co. v. Superior Court*, 15 Cal. App. 276, 114 Pac. 589.

1. *Favorite v. Superior Court*, 34 Cal. App. Dec. 1047, 198 Pac. 1004.

2. *Kullman, Salz & Co. v. Superior Court*, 15 Cal. App. 276, 114 Pac. 589; *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27.

3. *Kullman, Salz & Co. v. Superior Court*, 15 Cal. App. 276, 114 Pac. 589.

4. *Ex parte Clarke*, 126 Cal. 235, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546 (question raised but not decided; and the question

was also raised as to whether, since the statute requires that the books of the corporation should be kept in its office, it could be required to remove them from such office).

5. *Bradford v. Woodworth*, 108 Cal. 684, 41 Pac. 797 (minute-book); *Union Trust Co. v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615 (identification by the president of his own signature and the signature of the secretary to the minutes of a meeting is sufficient); *Hurwitz v. Gross*, 5 Cal. App. 614, 91 Pac. 109. See *Union Sav. Bank v. Rinaldo*, 6 Cal. App. 637, 92 Pac. 873 (where the question was raised as to whether an affidavit that notice of assessment had been published should be certified by the secretary

or by the officer who made them during his term of office.⁶

It is not necessary that the name of the corporation itself be subscribed to the written record or memorial of its acts; it is enough that the record shows on its face that it is the act of the corporation.⁷ But before a resolution spread on the records of a meeting can be admitted in evidence, it must appear that the meeting was regularly called and held. However, in the absence of evidence to the contrary, it is presumed that the meeting was regularly held.⁸

§ 134. Proof by Copy of Record.—A duly certified copy of a resolution furnished by the secretary or proper officer and authenticated by the corporate seal is presumptively the act of the corporation,⁹ and is admissible in evidence as such, and, in the absence of any countervailing proof, the recitals are binding upon the corporation. It is not necessary in proving the contents of such a resolution, that the record thereof in the books of the corporation be produced, nor to show that no such record had been kept.¹⁰ But a paper purporting to contain extracts from the minutes, to which is attached the affidavit of the president that, to the best of his knowledge and belief, the extracts are true extracts from the original minutes of the meetings, is not admissible because not properly certified under the provisions of section 1918, subdivisions 6 and 7 of the Code of Civil Procedure, which requires certification by the

of the corporation in order to entitle it to admission in evidence, but not decided); *Geary St. etc. R. Co. v. Campbell*, 39 Cal. App. 496, 179 Pac. 453 (stock books over thirty years old held to be sufficiently authenticated).

6. *Zierath v. Claggett*, 31 Cal. App. Dec. 406, 188 Pac. 837 (the books continue presumptively to be the books of the corporation).

7. *Dearborn v. Grand Lodge A. O. U. W.*, 138 Cal. 658, 72 Pac. 154.

8. *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *Balfour-Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891; *Granger v. Original Empire etc. Min. Co.*, 59 Cal. 678. See *infra*, § 434.

9. *Purser v. Eagle Lake Land etc. Co.*, 111 Cal. 139, 43 Pac. 523; *Hawley v. Gray Bros. etc. Paving Co.*, 106 Cal. 337, 39 Pac. 609.

10. *Purser v. Eagle Lake Land etc. Co.*, 111 Cal. 139, 43 Pac. 523.

legal keeper or custodian.¹¹ The proper record book should be in the office of the secretary,¹² who has charge of the books and records.¹³ Where a statute provides for the attaching to an instrument of the secretary's certificate of the adoption of a resolution of the stockholders authorizing it, such certificate is for the convenience of proof, and its prima facie character as evidence yields to the production of the original record of its adoption.¹⁴

VII. CAPITAL STOCK AND ITS INCIDENTS.

In General.

§ 135. **Nature of Shares.**—Shares of the capital stock of a corporation are personal property,¹⁵ and therefore may be the subject of embezzlement.¹⁶ Authority of an agent to sell shares, like authority to sell any personal property, includes authority to warrant the title of the principal and the quality and quantity of the property.¹⁷ Shares of stock are a species of incorporeal property,¹⁸ and constitute an undivided share or interest in the common property, assets, profits or business of the corporation.¹⁹ But while a share of stock represents a pro rata interest in all such property, the board of directors has no power to declare any particular share or class of shares to be representative of any particular part of the corporate assets, in the absence of clear legislative authority. Hence, stock

11. *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169.

12. *Southern California Colony Assn. v. Bustamente*, 52 Cal. 192.

13. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050. See *infra*, §§ 476, 477.

14. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

15. Civ. Code, § 324.

16. *People v. Williams*, 60 Cal. 1.

17. *Browne v. San Gabriel etc.*

Rock Co., 22 Cal. App. 682, 136 Pac. 542, 544. See AGENCY, vol. 1, p. 719.

18. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

19. *People v. Badlam*, 57 Cal. 594; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282; *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393.

which is part of a stock dividend is not limited for its value to the increased amount of assets, but derives its value from the entire assets of the corporation.²⁰

§ 136. Situs of Stock.—The situs of stock is in the state where the corporation resides, which is ordinarily, of course, the state by or under whose laws it was created.¹ Thus, stock in a domestic corporation has its actual situs in California.² Contracts respecting stock and other property of that incorporeal character which owes its existence to or is regulated by peculiar local laws must be made and carried into execution according to those laws. They constitute exceptions to the rule requiring the validity of contracts respecting most other sorts of personal property to be determined by the *lex domicilii* or the *lex loci contractus*, as the case may require. Thus, the legality and sufficiency of a sale or assignment of stock must be ascertained by the provisions of the laws of the state of incorporation.³ But for all practical purposes, a foreign corporation may be a California corporation, as where its contemplated business is all to be transacted in this state and all of its property is to be located here. In such case, there is no reason why the fiction as to the situs of the corporate entity should not yield in the interests of justice to the actual facts.⁴

§ 137. Certificates as Distinguished from Shares.—It is the shares of stock which constitute the property which belongs to the shareholder;⁵ and the ownership of such shares is evidenced by certificates of stock.⁶ Although the

20. *Estate of Duffill*, 180 Cal. 748, 183 Pac. 337.

1. *Wait v. Kern River Min. etc. Co.*, 157 Cal. 16, 106 Pac. 98.

2. *Dow v. Gould etc. Min. Co.*, 31 Cal. 629. See *infra*, § 730, as to situs for purpose of taxation.

3. *Dow v. Gould etc. Min. Co.*, 31 Cal. 629.

4. *Wait v. Kern River Min. etc. Co.*, 157 Cal. 16, 106 Pac. 98. See *CONFLICT OF LAWS*, vol. 5, p. 465.

5. *Payne v. Elliott*, 54 Cal. 339, 35 Am. Rep. 80. See *supra*, § 135, as to nature of the shares and what they represent.

6. *People v. Badlam*, 57 Cal. 594. See cases cited *infra*.

certificate is often spoken of as the stock,⁷ a distinction exists between the terms, in that the shares are deemed to be the substance,⁸ whereas the certificate is spoken of variously as the "muniment of title,"⁹ "the symbol,"¹⁰ the "evidence,"¹¹ the "representative of value,"¹² or of the ownership of the stock. The certificate is not itself the property in the real sense,¹³ or its income.¹⁴

§ 138. Right to Particular Certificate.—The holder of shares in a corporation stands upon precisely the same footing as any other holder of the same character of stock and number of shares. Their interests are precisely similar and of the same value.¹⁵ Hence, one share will serve

7. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

8. *Hawley v. Brumagim*, 33 Cal. 394.

9. *Estate of Thomas*, 147 Cal. 236, 81 Pac. 539; *Williams v. Ashurst Oil etc. Co.*, 144 Cal. 619, 78 Pac. 28; *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

10. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55; *Hurlbert Title Ins. & Trust Co.*, 181 Cal. 692, 186 Pac. 142.

11. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457; *Film Producers v. Jordan*, 171 Cal. 664, 154 Pac. 605; *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616; *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; *Cortelyou v. Imperial Land Co.*,

156 Cal. 373, 104 Pac. 695; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; *Craig v. Hesperia Land & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55; *Majors v. Girdner*, 31 Cal. App. 47, 159 Pac. 826. And see generally the cases cited in this section.

12. *Film Producers v. Jordan*, 171 Cal. 664, 154 Pac. 605.

13. *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

14. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

15. *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282 (the nature of the property forbids the idea that

the same purposes in every respect as another of like stock.¹⁶ It follows that a pledgor cannot insist upon a return of the identical certificates;¹⁷ and there is no conversion if the pledgee keeps on hand and is ready at all times to restore to the pledgor certificates of stock corresponding to those received from the pledgor.¹⁸ Upon a conversion of a certificate by a trustee, if the wrongdoer is at all times ready and willing to transfer to the owner an equivalent number of similar shares in the same company, it is a case for nominal damages only; even if there is a technical breach of trust, it is a case of *damnum absque injuria*.¹⁹ But in such a case it must be alleged and proved that the defendant is in a position to make delivery of similar shares.²⁰

§ 139. Specific Performance of Stock Agreement.—On the principle that, in general, an agreement to transfer personal property can be compensated by damages,¹ specific performance of an agreement for the transfer of stock will not be enforced.² This rule applies more particularly to public stocks, such as are commonly bought and sold in the market; it has been held not to apply to shares which are limited in number and cannot always be had in the market. Where, however, damages will not afford the party a full, complete and adequate remedy, specific performance will be enforced.³ But one will be denied spe-

it could have a peculiar value as contradistinguished from any other equal number of shares in the same company).

16. *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084; *Hardenburgh v. Bacon*, 33 Cal. 356.

17. *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084.

18. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Hayward v. Rogers*, 62 Cal. 348; *Thompson v. Toland*, 48 Cal. 99. See PLEDGE.

19. *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282.

20. *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616.

1. *Wait v. Kern River Min. etc. Co.*, 157 Cal. 16, 106 Pac. 98. See SPECIFIC PERFORMANCE.

2. *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390.

3. *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390.

cific relief in the absence of proof that he would derive some peculiar advantage from the possession of the particular stock which he seeks to obtain.⁴ For instance, where the facts alleged show that the stock has no established market value, this is sufficient.⁵ So, also, where a pledgee has transferred certificates pledged to him, but has other certificates, he may be obliged by specific performance to transfer the proper number of shares to the pledgor.⁶ The corporation is not a necessary party to an action for specific performance of a stock agreement between individuals,⁷ for its position is merely that of a stakeholder.⁸

§ 140. Possessory Actions for Stock.—Originally at common law, since shares of stock were incapable of being subjected to actual possession, it was held that trover was not the proper remedy for their conversion. But the action of trover was developed into a remedy for the conversion of every species of personal property and came to be maintainable, not only for the certificate, but also for the thing itself, i. e., the shares which the certificate represented.⁹ But an action for claim and delivery under

4. *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027.

5. *Wait v. Kern River Min. etc. Co.*, 157 Cal. 16, 106 Pac. 98; *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276; *Sherwood v. Wallin*, 1 Cal. App. 532, 82 Pac. 566.

6. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084.

7. *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120; *Sherwood v. Wallin*, 1 Cal. App. 532, 82 Pac. 566.

8. *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120.

9. *Payne v. Elliott*, 54 Cal. 339, 35 Am. Rep. 80, sustaining a judgment for the value of the shares

upon a showing of delivery of certificates of stock as security and conversion thereof. In this case the court says, quoting from authority: "If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted—that the conversion of the paper constitutes the entire wrong. The real act done in such cases is precisely the same as that done here—no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction

the code¹⁰ will not lie to recover shares of stock where the proceeding is not aimed at the certificate representing the shares and it is not mentioned in the complaint, since "stock" in a corporation is an incorporeal, intangible thing, and therefore incapable of identification or seizure under the writ. Hence, in an action to recover the possession of stock, mere reference to the stock, without describing or referring to the certificate representing such stock, if any there be, does not state a cause of action in claim and delivery, which is a possessory action.¹¹ If there be no certificate for the shares, then the action of claim and delivery obviously does not afford the proper remedy either for compelling the corporation to issue the stock of a party claiming to own it or for determining which of two or more adverse claimants is entitled to have the certificate issued and delivered to him.¹²

§ 141. Actions to Determine Ownership.—No action lies in California to quiet title to stock in a corporation.¹³ Although the code provides for an action by one person against another to determine an adverse claim which the latter makes against the former for money or property upon an alleged obligation,¹⁴ such action, it has been held, will not lie to determine an adverse claim to stock between

where in reality there is no difference. . . . The stock in both cases was converted; and we think that in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained."

10. See CLAIM AND DELIVERY, vol. 5, p. 153.

11. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Ashton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624; *Lamus v. Engwicht*, 39 Cal.

App. 523, 179 Pac. 435. See CLAIM AND DELIVERY, vol. 5, p. 153.

12. *Lamus v. Engwicht*, 39 Cal. App. 523, 179 Pac. 435.

13. *Lamus v. Engwicht*, 39 Cal. App. 523, 179 Pac. 435. See *Jackson v. Queen Oil Co.*, 184 Cal. 645, 195 Pac. 51 (action to establish title to stock). See *Grant v. Bannister*, 145 Cal. 219, 78 Pac. 653, which was an action to quiet title to and have plaintiff adjudged the owner of shares of stock.

14. See Code Civ. Proc., § 1050. See QUIETING TITLE.

individuals.¹⁵ A corporation has no interest in the individual ownership of its shares,¹⁶ and is not a necessary¹⁷ nor a proper party¹⁸ to a controversy between third parties as to the ownership of particular shares of its stock.¹⁹ But an action by way of interpleader may be brought by a corporation to determine ownership of shares of its capital stock.²⁰ An action may be brought to enforce a trust in stock and to have the stock restored upon a compliance with terms of a contract.¹ And in an action to establish ownership of stock standing in the name of another, the ownership is all that is material to be alleged.²

Preferred Stock.

§ 142. Creation of Preferences.—All corporations formed for profit are permitted to provide for the classification of their capital stock into preferred and common stock, in

15. *Gagossian v. Arakelian*, 9 Cal. App. 571, 99 Pac. 1113 (holding allegations not sufficient to constitute a good bill quia timet in that it was not alleged that the plaintiff apprehended danger to his property in that the instrument held by defendant might be vexatiously or injuriously used against him when the evidence to impeach it might be lost, or that it threw a cloud or suspicion over his title, the allegations being only that the corporation because of the claim made against it by defendant refused to recognize plaintiff as legal holder of the certificate). See *Lamus v. Engwicht*, 39 Cal. App. 523, 179 Pac. 435, holding that complaint did not state a cause of action against defendants under section 1050 of the Code of Civil Procedure.

16. *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509.

17. *Estate of Thomas*, 147 Cal. 236, 81 Pac. 539.

18. *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509.

19. *Estate of Thomas*, 147 Cal. 236, 81 Pac. 539; *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509.

20. *Bituminized Brick & Tile Co. v. Simons Brick Co.*, 183 Cal. 687, 192 Pac. 528. See INTERPLEADER.

1. *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.

2. *Cahlan v. Bank of Lassen County*, 11 Cal. App. 533, 105 Pac. 765 (holding that ownership of the stock is a material ultimate fact and may be pleaded as such). See *Bank of Napa v. Ferguson, Burns Estate, Inc.*, 32 Cal. App. Dec. 669, 192 Pac. 66, an action to determine ownership of stock in defendant corporation, where only the question of sufficiency of the evidence to support the findings was raised.

which event the articles must set forth a statement of the number of shares to which preference is granted and the number to which no preference is granted; also a clear and succinct statement of the nature and extent of the preference; and except as to the matters and things so stated, no distinction is permitted to exist between such classes of stock or the owners thereof. The classification may be provided for in the original articles,³ or in the amended articles. Likewise an amendment may be had for the purpose of changing the statement appearing in the original or in amended articles as to the nature and extent of the preference.⁴ The plain purpose of subdivision 6 of section 290 of the Civil Code is that there shall be no classification of shares by way of preference, or distinction between them, unless such classification, with the preference or distinction upon which it is based, be stated in the articles, and to prohibit any distinction or preference between shares of any nature whatsoever which is not so expressly provided for by the articles. Thus, a contract for non-assessability of part of the stock is directly within the prohibition as being an attempt to create in the general class of common stock a subclass of preferred stock having a special privilege, such a preference, not being provided for in the articles, is prohibited and void.⁵ The mere act of classifying stock into two or more kinds, without any

3. Civ. Code, § 290, subd. 6. See *Huntington Park Imp. Co. v. Park Land Co.*, 165 Cal. 429, 132 Pac. 760, where the question was raised as to whether a guaranty of the just debts and obligations of, and all claims against the corporation would cover the claims of preferred stockholders to be reimbursed for their several investments in such stock, but where there was no evidence of the nature or extent of the preference. See *supra*, § 47, as to statement of preference in articles of incor-

poration; and *infra*, § 156, as to statement of preference in certificate.

4. Civ. Code, § 362. See *supra*, § 54, as to amendment of articles generally.

5. *Martin v. Palmer Union Oil Co.*, 184 Cal. 386, 193 Pac. 950, overruling *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303, as not properly applying principles to the facts, and as inadvertently overlooking a code provision on the subject.

change in the number of shares, while required to be done as the statute ordains, involves nothing more than a contract between the stockholders as to how they shall divide the profits and the corporate property, and is said not to be in any sense tantamount to increasing or reducing such stock, within the provisions of section 359 of the Civil Code.⁶

§ 143. Limitations upon Preferences.—It is especially provided with respect to creating preferences in the classification of capital stock that no preference shall be granted, nor any distinction made, between the classes of stock, either as to voting power or as to liability of the holders thereof to creditors. And it is also provided that preferred and common shares must be of the same par value.⁷ The statutes were framed and the decisions under them are based upon a capitalization represented by shares of a single par value. And the requirement that shares, whether common or preferred, must be of the same par value, although contained in the statute, is nevertheless a corollary of the other prohibitions as to preferences or distinctions as to voting power or liability to creditors, for if the common shares and preferred shares have different par values, preference is thereby granted as to the voting power, to the stock with the lesser par value, while preference as to stockholder's liability is given to the stock with the greater par value.⁸

Par Value and Market Value.

§ 144. In General.—The par value of stock of ordinary corporations is not regulated by statute,⁹ although certain

⁶ California etc. Light Co. v. Jordan, 19 Cal. App. 536, 126 Pac. 598.

⁷ Civ. Code, §§ 290, subd. 6, and 362.

⁸ Film Producers v. Jordan, 171 Cal. 664, 154 Pac. 605, per Henshaw, J.

⁹ See Civ. Code, § 290, subd. 6, which provides that the articles

particular corporations have been so regulated.¹⁰ The articles of incorporation may be amended to change the statement therein as to the amount of the par value of the shares.¹¹ Although there is support in the authorities for the view that the par value of stock is *prima facie* its actual value, this *prima facie* proof may be met by proof that the actual value of the stock is not equal to its par value. However, an agreement that one shall receive paid-up stock in the corporation amounting to a certain sum does not entitle him to receive stock actually worth that much, but merely to have stock of the nominal or par value of that amount issued to him.¹²

§ 145. Stock of No Par Value.—In 1917, the legislature passed an act relating to the issue of shares without a nominal or par value (other than preferred stock having a preference as to principal) and providing for a statement in the articles of incorporation (in lieu of the statements prescribed by section 290 of the Civil Code) of the amount of capital stock, the number of shares into which it is divided and the par value thereof. It is expressly provided, however, that no distinction shall exist between any shares or classes of shares either as to voting power or as to the statutory or constitutional liability of the holders thereof to the creditors of the corporation, and that each share of stock without nominal or par value shall be equal in every other respect to every other share authorized to be issued, subject only to preferences granted to preferred stock, if any, as stated in the articles. The corporation may sell its authorized shares for such consideration as may be prescribed in the articles and when sold for such consideration shall be deemed to be fully paid. For the purpose of any rule of law or any statutory provision relating to the

shall state the par value of the shares, but does not limit it as to amount.

10. See *BANKS*, vol. 4, p. 134.

11. Civ. Code, § 362, subd. 6.
See *supra*, § 54,

12. *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834.

amount of the capital stock or the amount or par value of its shares, the aggregate amount of the capital stock of such a corporation is deemed to be the amount specified as the amount of capital with which the corporation will carry on business. The amount of the par value of shares of no par value is deemed to be the aliquot part of the aggregate capital in excess of preferred stock authorized to be issued with a preference as to principal.¹³

§ 146. Market Value as Basis of Damages.—Under the code rule as to the detriment caused by a wrongful conversion of personal property,¹⁴ where the plaintiff avers and proves a conversion of his stock he is entitled to the value of the property at the time of the conversion, with interest from that time,¹⁵ or, at his option, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest.¹⁶ But where

13. Stats. 1917, p. 1321. See supra, § 47, as to the contents of the articles.

14. Civ. Code, § 3336. See *TROVER AND CONVERSION*.

15. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476 (conversion of stock by refusal to transfer stock on the books); *Tulley v. Tranor*, 53 Cal. 274 (holding that upon an issue only as to the value at the date of conversion it is reversible error to admit evidence as to the value of the stock converted between the date of the conversion and the date of trial); *Myers v. Chittyna Exploration Co.*, 20 Cal. App. 418, 129 Pac. 469 (holding that one is not estopped in a case for a conversion to deny that shares of stock are worth par, and it is error to refuse testimony as to the market value).

Where damages are given for conversion of the stock, dividends may not be recovered in addition; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476. See infra, § 206, as to conversion by the corporation.

16. *Potts v. Paxton*, 171 Cal. 493, 153 Pac. 957 (conversion of mining stock); *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476 (stating the rule in action where the conversion consisted in the refusal of the corporation to transfer stock upon the books); *Fromm v. Sierra Nevada S. Min. Co.*, 61 Cal. 629; *Dent v. Holbrook*, 54 Cal. 145. See note, 4 Cal. Law Review, p. 246, discussing this rule. See, generally, *TROVER AND CONVERSION*.

there is no express finding upon the point as to whether the action was prosecuted with due diligence, the plaintiff is not entitled to a judgment based on the highest value of the stock.¹⁷ Ordinarily, the amount recoverable for failure to deliver stock of a corporation is the market value of such stock, but where it has no ascertainable market value, then the actual or intrinsic value must be taken as the basis.¹⁸ The measure of damages for failure to issue stock would be the detriment suffered by the plaintiff by such failure, that is to say, the actual value of the stock at the time he should have received it.¹⁹ Where the asserted value of the stock is based upon no facts, and is fanciful, unsubstantial and imaginary, and cannot even be called speculative or prospective, the court may properly find that even if issued the stock would have no value that could be ascertained.²⁰ The fact that stock in general may have a fictitious value is not relevant to the point of whether the stock in question has a fictitious value at a particular time.¹

Increase or Reduction of Capital Stock.

§ 147. **In General.**—The capital stock of corporations cannot be increased except in pursuance of general law.² And it is provided that a corporation cannot increase or

17. *Niles v. Edwards*, 90 Cal. 10, 27 Pac. 159.

18. *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834. See *Hitchcock v. McElrath*, 72 Cal. 565, 14 Pac. 305, where recourse was had to proof of the value of the property of the corporation to determine the value of the stock converted.

19. Civ. Code, § 3356, providing that for the purpose of estimating damages the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner; *Peek*

v. Steinberg, 13 Cal. 127, 124 Pac. 834.

20. *Eisenmayer v. Leonardt*, 148 Cal. 596, 84 Pac. 43.

1. Commercial etc. Bank of San Jose *v. Pott*, 150 Cal. 358, 89 Pac. 431.

2. Const., art. XII, § 11. See *infra*, § 308, as to increase of capital stock or issue for purpose of additional compensation or sale to employees or to those engaged in the actual conduct of the business under Stats. 1921, p. 32; and see *infra*, § 309 et seq., as to the pro-

diminish its capital stock merely by amendment of the articles.³ While any change effected in the number of shares, if not legally performed, may result in impairing or disturbing in some manner the rights of creditors of the corporation, as, for instance, by withdrawing its property from the demands of creditors, yet the mere act of classifying capital stock without changing the number of shares, cannot be held to be in any sense tantamount to increasing or reducing such stock; it involves nothing more than a mere contract between the stockholders as to how they shall divide the profits and the corporate property after the payment of the corporate obligations.⁴ For reducing or increasing the capital stock, except as provided in section 359 of the Civil Code, unless first permitted or authorized so to do by the commissioner of corporations, the directors incur personal liability.⁵

§ 148. Procedure for Increase.—The capital stock may be increased at a special meeting of the stockholders,⁶ by a vote representing at least two-thirds of the subscribed or issued capital stock of the corporation.⁷ An increase of the capital stock cannot be accomplished otherwise than at a meeting of the stockholders as provided by the code and constitution.⁸ And it has been held that the accomplishment of the increase by written assent of stockholders is not contemplated by the constitution at all.⁹ The increase is

cedure for authorizing such increase or issue.

3. Civ. Code, § 362; California etc. Light Co. v. Jordan, 19 Cal. App. 536, 126 Pac. 598.

4. California etc. Light Co. v. Jordan, 19 Cal. App. 536, 126 Pac. 598.

5. Civ. Code, § 309. See *infra*, § 512 et seq.

6. Civ. Code, § 359. See *infra*, § 149, as to notice of special meeting for such purpose.

7. Civ. Code, § 359, subd. 1.

8. Civ. Code, § 359, subd. 4; Const., art. XII, § 11.

9. Ewing v. Oroville Min. Co., 56 Cal. 649 (holding the provisions of Civ. Code, § 359, as they existed at the time of the adoption of the constitution, providing for increase through the medium of a meeting or by written assent of three-fourths of the capital stock, to be unconstitutional).

completed by the execution and filing of a certificate setting forth the proceedings had for that purpose,¹⁰ the procedure being the same as is required by the constitution and section 359 of the Civil Code for increasing the bonded indebtedness of a corporation.¹¹

§ 149. Notice of Meeting.—The constitution provides that the stock and bonded indebtedness of a corporation shall not be increased except in pursuance of general law, nor without the consent of persons holding the larger amount in value of the stock, at a meeting called for that purpose giving sixty days' public notice as may be provided by law.¹² This constitutional provision is not self-executing as it does not of itself furnish a complete mode of accomplishing the object which is to be carried out in terms by a general law to be enacted by the legislature.¹³ The provision is mandatory, not directory, and hence it has been held that an attempted increase of capital stock at a meeting held by unanimous consent, without the notice prescribed by the constitution and by section 359 of the Civil Code, is ineffectual.¹⁴ Under the provisions of section 359 of the Civil Code, which points out how and in what manner the capital stock may be increased or diminished,¹⁵ notice of a meeting to consider an increase must be given by newspaper publication.¹⁶ And where the by-laws pre-

10. See *infra*, § 151.

11. See *infra*, § 588.

12. Const., art. XII, § 11.

13. *Ewing v. Oroville Min. Co.*, 56 Cal. 649.

14. *Navajo Min. etc. Co. v. Curry*, 147 Cal. 581, 109 Am. St. Rep. 176, 82 Pac. 247 (holding that while there is reason and authority to sustain the contention that when the sole object of the notice has been accomplished by the voluntary attendance of all interested parties, the provision for published notice

should be held directory and not imperative; this rule cannot be applied to the constitutional provision in question). See, Const., art I, § 22, providing that the provisions of the constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise. See CONSTITUTIONAL LAW, vol. 5. p. 571.

15. *California etc. Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

16. Civ. Code, § 359, subd. 1, providing for notice given by pub-

scribe the newspaper in which notices of meetings of directors or stockholders are to be published, the notice must be published in such paper, unless publication thereof has ceased.¹⁷ The notice must be published once a week for at least sixty days, and must specify the object of the meeting and the amount to which it is proposed to increase the capital stock, the time and place of holding the meeting, which latter must be at the principal place of business of the corporation and at the building where the board of directors usually meet.¹⁸ In addition to notice by publication, a notice of the meeting must be mailed by the secretary to each stockholder at least thirty days prior to the day appointed for the meeting.¹⁹

§ 150. Reduction of Capital Stock.—Alternative methods are provided for the diminution of capital stock. The first method provided is identical with that pursued upon an increase of the capital stock, by meeting called by published and mailed notice stating the amount to which it is proposed to diminish the capital stock, which amount must not be less than the corporate indebtedness.²⁰ In lieu of this method, a corporation may diminish its capital stock by resolution adopted by unanimous vote of its board of directors at a regular meeting, or at a special meeting called for that purpose, and approved by the written assent or assents of stockholders holding two-thirds of the subscribed or issued capital stock, which assent or assents must be filed with the secretary of the corporation. The secretary of the corporation must, however, mail a copy of

lication in a newspaper published in the county or city and county where the principal place of business of the corporation is located, or if there be none published in said county or city and county, then in a newspaper published in an adjoining county or city and county, such paper to be designated by the board of directors or trus-

tees in the order calling for the meeting.

17. Civ. Code, § 359, subd. 8. See Civ. Code, § 303, subd. 8, as to newspaper publications in general.

18. Civ. Code, § 359, subd. 2.

19. Civ. Code, § 359, subd. 4.

20. Civ. Code, § 359, subds. 1, 2,

4. See *supra*, § 149, as to notice.

the resolution to each stockholder at least thirty days before the final steps are taken for rendering the resolution effectual by signing and filing the certificate of decrease. Within that time, any stockholder may file with the secretary his dissent in writing. If, however, within the thirty-day period, the written assent or assents of stockholders holding all the subscribed or issued capital stock be filed, the certificate may be signed and filed without further delay.¹ When the corporation has power to reduce its capital stock, it may accomplish the reduction by purchasing and retiring a portion of its shares.² The procedure for authorizing the reduction of the capital stock is the same as that for originally creating a bonded indebtedness.³

§ 151. Certificate of Proceedings.—The code prescribes in detail the proceedings which must be observed for the increase or decrease of the capital stock, for the proper certification thereof to the secretary of state, and for the filing of certified copies of the certificate with the county clerk of the county in which the principal place of the business of the corporation is situated and in every county in which the corporation holds property. It is further provided that when the certified copy or copies are so filed, the certificate is conclusive proof of the increase or diminution of the capital stock and of the validity thereof.⁴ For failure to comply with the requirements as to filing, the corporation becomes subject to the penalties prescribed by section 299 of the Civil Code.⁵ Where the attempted increase is void for defects in procedure, mandate will not issue to compel the secretary of state to file the certificate.⁶

1. Civ. Code, § 359, subd. 5. See *infra*, § 151, as to signing certificate and filing in the proper offices.

2. *Tulare Irr. Dist. v. Kaweah Consol. etc. Co.*, 5 Cal. Unrep. 330, 44 Pac. 662.

3. See *infra*, § 590.

4. Civ. Code, § 359, subds. 7, 8.

5. Civ. Code, § 359, subd. 8. See *supra*, § 52, as to failure to file copies in counties.

6. *Navajo Min. etc. Co. v. Curry*, 147 Cal. 581, 109 Am. St. Rep. 176, 82 Pac. 247.

Corporate Lien on Stock.

§ 152. **In General.**—At common law, no lien existed in favor of the corporation upon its capital stock.⁷ Under the statutes a corporation has no general lien on stock not fully paid up which is not dependent upon possession,⁸ except to secure the payment of assessments levied for the purpose of paying expenses, conducting business and paying debts.⁹ And where the corporation parts with its claim against the stockholder to a third person, it loses its lien on the stock and cannot refuse to register a transfer upon its books.¹⁰

§ 153. **Creation of Lien as Against Bona Fide Purchaser.**—A corporation may not, through a by-law making all transfers of stock subject to the payment of debts and equities in favor of the corporation against the transferor prior to the transfer, create a secret lien on the stock which will adhere to it in the hands of a bona fide purchaser for value and without notice, to whom the stock has been transferred in the mode prescribed by law.¹¹ And it is doubted whether a lien on stock can be created by a by-law in view of section 324 of the Civil Code,¹² for such by-law would be inconsistent with the code provisions which

7. *People v. Crockett*, 9 Cal. 112.

8. *Lankershim Ranch Land etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134.

Where the stockholder is in possession of the certificate, he is in possession of the stock, and the corporation is not, hence it can have no general lien on the stock; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359.

9. Civ. Code, § 331.

10. *Ralston v. Bank of California*, 112 Cal. 208; 44 Pac. 476.

11. *Lankershim Ranch etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac.

134; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359 (holding that even under the power granted the corporation to regulate the transfer of its capital stock, it has no power to create such a lien upon the stock). See *People v. Crockett*, 9 Cal. 112, where question was raised but not decided.

12. *Lankershim Ranch etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134; *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359.

permit a transfer of shares by indorsement and delivery of the certificate.¹³ But in no event can a by-law giving the corporation a lien have a retrospective operation upon a transfer made prior to its passage.¹⁴ Even in case of assessment liens, where the lien exists by statute, if the books do not show the unpaid claims, there is some doubt whether the shares are subject to the lien in the hands of an innocent purchaser.¹⁵

§ 154. Lien by Contract or Statutory Provision.—Under the California statutes a lien, not dependent upon the possession of the certificate, is given to corporations on their stock, to secure payment of assessments levied in accordance with the statutory provisions.¹⁶ In the case of such a lien, a transfer does not affect the right to enforce the assessment against the shares, since the lien is upon the shares, not upon the certificate, which merely evidences ownership. A new certificate represents the same shares, which remain subject to any lien the corporation may have upon them, the new owner taking subject to such lien,¹⁷ and the same is true of an attachment lien.¹⁸ But whatever may be the power of the corporation to create a lien through a by-law, it may have a lien to secure the indebtedness of a stockholder, not dependent upon possession of the certificate, by contract with the stockholder.¹⁹ And by contract the corporation may take a certificate in pledge

13. *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359.

14. *People v. Crockett*, 9 Cal. 112.

15. *Craig v. Hesperia Land & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

16. *Lankershim Ranch etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134.

17. *Craig v. Hesperia Land & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10. See *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663, holding

that under the law of California an executor is entitled to the transfer of stock held by the testator in his lifetime and that if the corporation has any lien on the shares for any part of the unpaid purchase price of the stock, such lien would not be lost by the transfer subsequently to the executor.

18. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670.

19. *Lankershim Ranch etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134.

for an indebtedness and thereby have a lien on the stock. Thus, where the certificate contains a clause giving a lien for money due from the stockholder, although perhaps a mere acceptance of the certificate without objection would not constitute a contract in the absence of further dealings, nevertheless, where money is borrowed from the corporation without anything to exclude the idea that the condition is to be binding, this is an assent to it so far as the particular loan is concerned, and the corporation has a lien by implied contract.²⁰ But a lien on shares for the unpaid portion of the par value existing in favor of the corporation is not a mortgage within section 726 of the Code of Civil Procedure, as it contains no element of transfer or conveyance of the property; hence the corporation may enforce payment without foreclosure of the lien.¹

Issue of Certificates.

§ 155. In General.—It is provided in the code that

“All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, and may provide, in their by-laws, for issuing certificates prior to full payment, under such restrictions and for such purposes as their by-laws may provide, but any certificate issued prior to full payment must show on its face what amount has been paid thereon. All certificates of stock issued by corporations authorized by their articles of incorporation to issue stocks of different classes, shall express upon their face the character of stock represented by said certificates. The said certificates shall also state the number of shares of stock of each class which said corporation is authorized to issue, and the said certificates shall also contain a statement of the nature and extent of the preference granted to the preferred stock.”²

20. *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. B. A. 233, 21 Pac. 852.

1. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

2. Civ. Code, § 323.

The clause in the section quoted providing that any certificate issued prior to full payment must show on its face what amount has been paid thereon was added by amendment in 1905. The latter provisions covering cases of issuance of preferred and common stock were added in 1907.³

§ 156. Form and Nature of Certificate.—A certificate of stock must be signed by the president and secretary of the corporation,⁴ or, in the absence of the president, by the vice-president acting in his place and stead. One purpose of the signature of the president is, it has been said, to protect the public and the company against possible fraudulent acts of the secretary. In taking a certificate one has a right to rely on the signature of the officers and verity is presumed from the fact that the corporate seal is attached.⁵ The issuance of a certificate is a mere ministerial duty which officers are bound to perform; hence the signature of a *de facto* officer is sufficient.⁶ The certificate in itself is the solemn declaration of the corporation under its seal that the stock belongs to the person therein named,⁷ or that one is the owner of shares in the company,⁸—a declaration on which third parties have a right to rely.⁹ The certificate must also show the character of stock represented by it, and state the number of shares of each class which the corporation is authorized to issue, as well as the nature and extent of any preference granted the preferred stock. If the certificate is not fully paid for, it must show on its face the amount which has been paid thereon.¹⁰ Certificates for shares without nominal or par

3. See, also, *supra*, §§ 47, 142, 143, as to preferred stock.

4. Civ. Code, § 323.

5. *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950.

6. *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

7. *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950.

8. *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

9. *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950.

10. Civ. Code, § 323.

value are forbidden to have printed or otherwise expressed thereon any nominal or par value.¹¹

§ 157. Issuance Prior to Full Payment.—A corporation is not bound to issue a certificate of stock until the subscription price is fully paid.¹² Issuance prior to full payment, however, is not prohibited, and section 323 of the Civil Code authorizes the stockholders to enact by-laws in accordance with which the corporation may issue such certificates.¹³ Thus, a corporation for profit is permitted to give credit to a subscriber for its capital stock for stock purchased by him.¹⁴ And upon receiving the transferable certificate showing his subscription to and payment of all installments due on the shares, a subscriber becomes the owner of the shares evidenced by the certificate, subject only to the unpaid installments. Such a certificate gives him as complete possession of the shares therein mentioned as though it were a certificate in the ordinary form issued for paid up stock.¹⁵ Where the statute does not require certificates issued prior to full payment to state the amount actually paid thereon, the issue is not a representation that it has been fully paid.¹⁶ But the fact that the certificate

11. Stats. 1917, p. 1321.

12. California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

13. Green v. Abietene Medical Co., 96 Cal. 322, 31 Pac. 100; Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

14. Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110.

15. Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134 (setting out form of certificate). See Herron v. Gear, 26 Cal. App.

18, 145 Pac. 731, to effect that an indorsement on a certificate that it is sold subject to payment of a note and on condition that it shall not be sold, transferred or otherwise disposed of until conditions of payment have been met, and a certificate thereof indorsed by the president or secretary on the certificate itself, does not purport to require that any money shall be paid to the corporation itself.

16. Perkins v. Cowles, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; O'Dea v. Hollywood Cemetery

does not comply with section 323 is an irregularity applying merely to the certificate and not excusing full payment for the stock.¹⁷ It was early held, under an act providing for the issuance of certificates of stock "for all stock paid up,"¹⁸ that this clearly negatives by implication the right to issue certificates in advance of payment.¹⁹

§ 158. Necessity for Issuance.—The shares of stock and interest of the stockholder being distinct from the certificates evidencing such shares or interest,²⁰ one may own an interest in the capital stock although the certificates are never issued to him,¹ for the shares exist independent of any certificate.² Thus the acceptance by the corporation of the application of a subscriber for the purchase of stock constitutes a sale and title to or ownership of the stock ipso facto vests in him.³ And the interest of the vendor of stock ceases on the consummation of the sale as affectually

Assn., 154 Cal. 53, 97 Pac. 1. See *infra*, § 301, as to stockholder's liability for unpaid amounts on such stock.

17. *Ferrochem Co. v. Danziger*, 23 Cal. App. 584, 138 Pac. 966.

18. Railroad act of 1850, § 14, Gen. Stats., p. 128.

19. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

20. See *supra*, § 135.

1. *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 1000; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838; *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *San Joaquin Land & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Payne v. Elliott*, 54 Cal. 339, 35 Am. Rep. 80 (holding that a trans-

fer on the books without the issuance of a certificate vests title in the transferee); *Doty v. California Rice Milling Co.*, 37 Cal. App. 449, 174 Pac. 389; *Majors v. Girdner*, 31 Cal. App. 47, 159 Pac. 826; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046; *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871; *San Francisco Commercial Agency v. Miller*, 4 Cal. App. 291, 87 Pac. 630.

2. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55. See *supra*, § 137.

3. *Majors v. Girdner*, 31 Cal. App. 47, 159 Pac. 826.

Nothing remains to be done in such case but the formal issuance of the certificate upon which the ownership of the stock does not depend; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838.

as though the shares had been assigned.⁴ The mere fact that certificates were not issued does not detract from the conclusion that the corporation was regularly and legally formed and that the incorporators became stockholders and were entitled to have issued to them certificates for the number of shares for which they had subscribed.⁵

§ 159. Compelling Issuance—Limitations Applicable.—

The code provides that a corporation must issue certificates for stock when fully paid for.⁶ And since a purchaser is entitled to a certificate showing his ownership of stock, the failure of the corporation to issue it cannot vitiate the contract of sale or impair his title to the stock. It is merely a violation of obligation which the purchaser may by appropriate legal proceedings compel the corporation to discharge.⁷ And so, an action to enforce issuance can be begun by a subscriber immediately after full payment, the right to enforce the contract specifically accruing upon making the payment. Such a right of action becomes barred four years thereafter under section 337, subdivision one, of the Code of Civil Procedure.⁸ Where, however, by mutual consent, the time of issuing the certificate is deferred indefinitely after payment, pending the occurrence of a future event or until the certificates shall be demanded by the subscriber, the corporation becomes a trustee of the stock for an indefinite period, to be terminated by the happening of the event or upon demand for the stock.⁹ In

4. Cortelyou v. Imperial Land Co., 156 Cal. 373, 104 Pac. 695.

5. J. W. Williams Co. v. Leong Sue Ah Quin, 30 Cal. App. Dec. 531, 186 Pac. 401.

6. Civ. Code, § 323.

The person entitled to the certificate is the owner of record; Sherwood v. Wallin, 154 Cal. 735, 99 Pac. 191.

7. Majors v. Girdner, 31 Cal. App. 47, 159 Pac. 826.

8. Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981.

9. Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981; Cortelyou v. Imperial Land Co., 156 Cal. 373, 104 Pac. 695. See Williams v. Ashurst Oil etc. Co., 144 Cal. 619, 78 Pac. 28, where "pool stock" was involved, and where the agreement was that the certificates should not be issued therefor for five years.

such cases the statute does not begin to run until there has been a breach of the trust, and mere neglect of the company to issue or of the subscriber to demand or compel the issuance of the certificate does not set the statute in motion. Under circumstances of a breach of trust, the statute applying to the case is section 343 of the Code of Civil Procedure providing for a four-year limitation "after the cause of action shall have accrued," to all actions for relief not otherwise provided for in the code.¹⁰ Even assuming that one is bound to demand the issuance of stock immediately after the money is paid, nevertheless, it has been held that two months cannot be said to be an unreasonable time to wait for the delivery of stock before demanding the return of the money, where peculiar circumstances exist. Thus, if the plaintiff is justified in believing until the date of his demand that the stock would be forthcoming and its delivery is never refused, these facts will bring the case within the rule as to peculiar circumstances justifying delay in making demand for the return of the money.¹¹

§ 160. Fraudulent or Unauthorized Issue.—The liability of a corporation for fraudulently issued stock does not arise from anything that occurs in the making of a subsequent transfer, but comes from the false issue itself which is the act of the corporate officers within the apparent scope of their authority—a representation in effect by the corporation itself that the false stock is genuine. The cor-

10. *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981 (holding that this action was barred inasmuch as the evidence showed that more than five years before it was commenced the corporation repudiated the trust relation).

11. *Fergus v. Venice Inv. Co.*, 36 Cal. App. 425, 172 Pac. 396 (applying the rule expressed in *Pinkiert v. Kornblum*, 5 Cal. App. 522, 90

Pac. 969, and citing *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43). See *infra*, § 262, for analogous rule in reference to making demand for payment of dividends. See *Pinkiert v. Kornblum*, 5 Cal. App. 522, 90 Pac. 969, as to what is a reasonable time which the law will allow an individual to cause corporate stock to be issued.

poration is not estopped from disputing the validity of a transfer of such stock, but only from disputing the authority of its own officers to issue it.¹² The provision of the code as to invalidity of unregistered transfers cannot be invoked to protect the corporation from liability for such fraudulent issues.¹³ And the mere fact that stock is issued to one of the officers raises no suspicion of their want of authority to issue it.¹⁴ As between the stockholder and the corporation an unlawful issue without consideration must be construed under section 359 of the Civil Code as rendering void the certificate, not the condition as to payment;¹⁵ and, being void, the persons receiving the stock do not thereby become stockholders.¹⁶ But where certificates are regularly issued, the objection that the consideration for the stock was not lawfully sufficient cannot be raised to invalidate the action of stockholders when third parties have dealt in good faith upon it.¹⁷ While it is true that the unanimous consent of stockholders cannot cure the illegality of issuing certificates in violation of law, yet the rule that the corporation is bound by an unauthorized act of its agents after it has been ratified by all the stockholders applies to the unauthorized issue of certificates.¹⁸

§ 161. Effect of Issuance of New Certificate.—When an old stock certificate is surrendered and a new one issued, the new certificate represents the same shares, and the

12. *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950.

13. *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950. See *infra*, § 223 et seq., as to unregistered transfers.

14. *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779.

15. *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638.

16. *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 Pac. 695.

17. *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516.

18. *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100.

identity of the stock is not affected by the transfer.¹⁹ The cancellation and issue of certificates does not work any change in the stock itself, which remains the same from first to last.²⁰ Accordingly, where an attachment is levied upon stock it is upon the shares rather than upon the certificate, and since the identity of the shares is not altered by the issuance of a new certificate, the lien, if valid in its creation, will persist notwithstanding the surrender of the certificate and the issuance of a new one to some person other than the defendant in the attachment suit.¹ In such case the levy of the attachment does not deprive the owner of the shares of his title. He still owns the stock and may exercise all the rights of ownership therein, subject to the lien of the attachment.²

§ 162. Issuance of Duplicate Certificate.—Whenever a certificate of stock in a corporation organized under the laws of California has been lost, destroyed or wrongfully withheld, the owner thereof may bring an action against the corporation for the purpose of obtaining a new or duplicate certificate.³ In such a case, procedure is practically identical with that provided for the obtaining of new or duplicate bonds under the provisions of section 329 of the Civil Code.⁴ Section 329, however, is limited to cases of loss or destruction by calamity, such as fire or earthquake.⁵ After the issuing of a new certificate pursuant to a judgment in such action, no action can ever be maintained by any person against the corporation with refer-

19. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Craig v. Hesperia Land & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10. See *supra*, § 137.

20. *Hawley v. Brumagim*, 33 Cal. 394; *Sherwood v. Wallin*, 1 Cal. App. 532, 82 Pac. 566.

1. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Craig v. Hesperia*

Land & W. Co., 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

2. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670.

3. See Civ. Code, § 328.

4. See *infra*, § 582.

5. *Brown v. Anderson-Cottonwood Irr. Dist.*, 183 Cal. 186, 190 Pac. 666.

ence to the said lost or destroyed certificate or the shares represented thereby,—such action being forever barred thereafter.⁶

VIII. SUBSCRIPTIONS AND SALE OF CAPITAL STOCK.

General Considerations.

§ 163. Character of Subscription Contract.—A subscriber for stock is one who has entered into an express contract to take a certain definite number of shares of the original issue.⁷ The agreement with the corporation to purchase its stock, in the absence of any agreement for a different price or a different time of payment, is that the subscriber will pay the par value of the stock on call.⁸ The contract of subscription may be entered into in various ways. Whenever an intent to become a subscriber is manifested, the courts generally hold that the contract of subscription exists and formal rules are for the most part disregarded.⁹ Hence it is a rule that a contract for an original issue of shares in exchange for property is in legal effect but a subscription for stock, even if it be not a subscription contract in form.¹⁰ A subscription certainly

6. Civ. Code, § 328. See LOST INSTRUMENTS.

7. *Ventura etc. R. Co. v. Collins*, 5 Cal. Unrep. 469, 46 Pac. 287, 48 Pac. 1115.

See note, 6 A. L. R. 1116, as to effect upon the validity of subscription to corporate stock of failure to comply with statutory requirement of payment at the time of subscribing.

8. *San Bernardino County Savings Bank v. Denman*, 62 Cal. Dec. 240, 200 Pac. 606.

An agreement to "subscribe and take" a certain number of shares

binds one as a stockholder of the corporation, but not to pay for the stock otherwise than as assessments therefor may be legally made; *Ventura etc. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65.

9. *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871; *Ventura etc. R. Co. v. Collins*, 5 Cal. Unrep. 469, 46 Pac. 287, 48 Pac. 1115.

10. *Pasadena Rapid Transit Co. v. Munson*, 37 Cal. App. 352, 174 Pac. 109. See *Doty v. California Rice Milling Co.*, 37 Cal. App. 449, 174 Pac. 389, holding that one who sells property retains no vendor's lien

implies a promise to pay and this promise sustains an action to collect, without proof of any particular consideration.¹¹ But of course the stockholder may agree to pay the amount of his subscription immediately or at stated times and thus relieve the corporation of the duty of making assessments. The subscriber may, by the terms of his subscription, vary his liability from that which exists merely by virtue of the statute.¹²

It is not necessary to the liability of a stockholder to creditors of the corporation that he should have subscribed for his stock in writing,¹³ or signed any subscription book,¹⁴ or signed the articles of incorporation,¹⁵ nor need he otherwise have formally agreed to pay the par value of the stock. The fact that one owns stock fixes his liability as a stockholder.¹⁶ And it has been held that a sale of the stock, instead of subscription, does not change the liability.¹⁷

§ 164. Who may Subscribe.—The state of California is forbidden to lend its credit to, or subscribe for or be interested in the stock of, any company, association or corporation.¹⁸ A municipal corporation also has never had power to subscribe to the stock of a private corporation

when he accepts stock of a corporation in payment.

11. *Ventura etc. R. Co. v. Collins*, 5 Cal. Unrep. 469, 46 Pac. 287, 48 Pac. 1115.

12. *Ventura etc. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65. See *infra*, §§ 318, 319.

13. *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057.

See note, 14 A. L. R. 394, as to contracts relating to corporate stock as within provisions of statute of frauds dealing with sales of goods, etc.

14. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

15. See *infra*, § 168.

16. *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136. See *infra*, § 383 et seq., as to persons liable as stockholders.

17. *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057.

18. Const., art. XII, § 13. See STATE OF CALIFORNIA.

except by special authorization of the legislature.¹⁹ But by act of the legislature, a public corporation formerly might be permitted or even required to subscribe to the stock of a corporation.²⁰ Thus, where a statute made it the duty of a county to subscribe to stock of a railroad corporation, it was held that mandamus would lie to compel performance of the duty.¹ Under the provisions of the present constitution the legislature has no power to authorize the state or any political subdivision thereof to subscribe for stock or to become a stockholder in any corporation, provided, however, that irrigation districts may purchase the stock of a foreign corporation owning a part of a water system in a foreign country, for the purpose of acquiring control of an entire international water system.² A private corporation has no implied authority to invest in shares of another corporation, and a subscription by one corporation to stock in another whose business is not specified in the articles of the subscribing corporation is ultra vires and void.³

§ 165. Construction of Subscription Contracts.—Subscription contracts are construed as are other contracts. Thus, upon the making of a contract of subscription the provisions of law existing at the time enter into and become a part of the contract.⁴ A written agreement may by express reference incorporate other written agreements and where such references are made the agreement will be construed as a whole; and so a supplemental agreement

19. *French v. Teschemaker*, 24 Cal. 518.

20. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354; *Robinson v. Bidwell*, 22 Cal. 379.

1. *Oroville etc. R. Co. v. Plumas County*, 37 Cal. 354.

2. Const., art. IV, § 31.

3. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047. See *supra*.

§ 44, as to who may be incorporators.

4. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 293 (provisions of the law as to levying assessments became a part of the contract); *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420; *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244 (provisions of law as to assessments become part of contract).

may carry constructive notice of the terms and conditions of the first subscription agreement and both be construed as one instrument.⁵ It has been held that if a court improperly admits parol evidence to explain the terms of a written offer to purchase stock, the error is without injury where the evidence tends to confirm the proper legal construction of the instrument.⁶

§ 166. Nature of Agreement Prior to Incorporation.—

An agreement to form a corporation and take a specified number of shares is, as to the corporation, executory; but when the promoters meet and organize the corporation for the objects and as specified in the agreement, and in the articles name the parties with the shares subscribed by each, it is an acceptance by the corporation of such parties as stockholders, and they become bound as such.⁷ The corresponding promises of other signers, and the common object sought to be accomplished by all the parties to the agreement constitute a sufficient consideration for the promise of each subscriber,⁸ and upon the formation of the corporation and its acceptance of such agreement, the subscribers are bound to take and pay for the number of shares subscribed.⁹ Persons designated by agreement as agents for the subscriber to collect money on subscriptions prior to actual incorporation, and as a preliminary thereto, are the agents of the subscribers prior to the organization of the corporation, but after the incorporation, they can only be the corporation's agents, and their functions as agents of the subscribers cease.¹⁰

5. *Beedy v. San Mateo Hotel Co.*, 27 Cal. App. 653, 150 Pac. 810.

6. *Provident Gold Min. Co. v. Manhattan Securities Co.*, 168 Cal. 304, 142 Pac. 884.

7. *San Joaquin Land & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

8. *Marysville etc. Power Co. v.*

Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

9. *Marysville etc. Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126; *Ferrochem Co. v. Danziger*, 23 Cal. App. 584, 138 Pac. 966.

10. *San Joaquin Land & W. Co. v. West*, 94 Cal. 399, 29 Pac. 785.

§ 167. Enforcement of Subscriptions Made Prior to Incorporation.—It is not material to the right of the corporation to maintain an action on a subscription that it is not expressly named in the agreement as the promisee, where the legal effect of such an agreement is a promise to pay to the corporation when organized.¹¹ Upon the formation of the corporation, the agreement with its advantages and rights inures to the benefit of the corporation, irrespective of any agreement to that effect, and notwithstanding it may contain special provisions for carrying its own terms into execution.¹² The corporation being the real party in interest,¹³ may maintain the action as upon a contract made for its benefit;¹⁴ and its right is unaffected by the fact that the trustee or agent of the subscribers might also have maintained a like suit.¹⁵ Likewise, the corporation is entitled to recover from such agent the money collected by him from the subscribers.¹⁶ But where the corporation is neither a party to the subscription paper nor has acquired the rights under it as successor of the subscribers, or otherwise, and it does not appear that any of the subscribers have joined in its formation or is a member thereof, the corporation cannot recover.¹⁷

§ 168. Necessity for Subscribers Signing the Articles.—The articles of incorporation are required to state the amount of the capital stock actually subscribed and by whom subscribed.¹⁸ It is not necessary, however, to the validity of the corporation or to the subscribers becoming stockholders that they should all sign the articles, for those who

11. Horseshoe Pier Amusement Co. v. Sibley, 157 Cal. 442, 108 Pac. 308; Marysville etc. Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

12. San Joaquin Land & W. Co. v. West, 94 Cal. 399, 29 Pac. 785.

13. Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 108 Pac. 308.

14. Kohler v. Agassiz, 99 Cal. 9,

33 Pac. 741; Marysville etc. Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

15. Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 108 Pac. 308.

16. San Joaquin Land & W. Co. v. West, 94 Cal. 399, 29 Pac. 785.

17. California Sugar Mfg. Co. v. Schafer, 57 Cal. 396.

18. Civ. Code, § 290, subd. 7.

sign act as agents of the others.¹⁹ But even if subscribers present at the organization of the corporation are considered as agents for those who are absent, the extent of their authority goes only to the formation of such corporation as has been agreed upon and their acts in excess are void as to nonconsenting subscribers.²⁰ Proof that one was an original subscriber in a certain amount may be made by the articles of incorporation.¹ As to liability for his subscription, however, the fact that a subscriber does not sign the articles is not material where he is bound by subscription agreement. The obligation in such case rests upon the agreement alone and not upon the relation of stockholder.² But a subscription before incorporation does not make one a stockholder, liable to the corporation as such, where his name and the amount of his subscription do not appear in the articles.³ To make one a member of the corporation, the statute must be complied with either by signing the articles or by otherwise complying with their provisions.⁴

§ 169. Right to Original Issue of Same Corporation.—

A subscriber cannot, in satisfaction of his rights, be compelled to accept from others, under a subscription contract, any stock that has been subscribed for and issued to other persons.⁵ But it has not been decided whether a corporation may issue to subscribers stock which has been issued but returned to the treasury, or whether such subscribers are entitled to an original issue from the treasury.⁶ Where all of the stock has already been subscribed,

19. San Joaquin Land & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349.

20. Marysville etc. Power Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

1. Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

2. Horseshoe Pier Amusement Co. v. Sibley, 157 Cal. 442, 103 Pac. 308.

3. Monterey etc. R. Co. v. Hildreth, 53 Cal. 123.

4. West v. Crawford, 80 Cal. 19, 21 Pac. 1123.

5. Gray v. Ellis, 164 Cal. 481, 129 Pac. 791.

6. Pasadena Rapid Transit Co. v. Munson, 37 Cal. App. 352, 174 Pac. 109 (raising, but not deciding, the point).

a later subscriber is entitled to recover back his money. The money paid by him for a subscription for stock in one corporation to the agents thereof cannot be diverted by them to another corporation of which they are also agents, even though such corporations are similar and there is no good reason why he should prefer one to the other.⁷ But where shares taken or subscribed by later subscribers are deducted from those of the agent in the original issuance of the stock, with the acquiescence of all parties concerned, there is no oversubscription.⁸

Conditional Subscriptions.

§ 170. **In General.**—Where the rights of creditors are not involved there is no reason why a conditional subscription agreement, not being secret, should not be enforceable against the corporation.⁹ But a secret agreement, severed and distinct from the subscriber's contract to pay for his stock, and whereby he is assured of an advantage over other purchasers of stock, cannot avail as against creditors,¹⁰ for such secret collateral agreements are void, being in the nature of a fraud upon subsequent subscribers and upon persons who afterward become creditors of the corporation.¹¹ In the making of conditional agreements for the sale of its stock, a corporation is bound by the acts of its agent.¹² And knowledge of conditional agreements made by the agent of the subscribers will be imputed to

7. Gray v. Ellis, 164 Cal. 481, 129 Pac. 791.

8. Tulare Sav. Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

9. Dickinson v. Zubiato Min. Co., 11 Cal. App. 656, 106 Pac. 123.

10. Quartz Glass etc. Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648.

11. Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.)

156, 129 Pac. 582; Tidewater Southern Ry. Co. v. Vance, 31 Cal. App. 503, 160 Pac. 1097; Quartz Glass etc. Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648 (holding that to declare a note void as well as the agreement would be to give full effect to the fraud, thus releasing the subscriber from his obligation).

12. Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

them.¹³ Where the agent is authorized to sell stock and represent the corporation in its sale, and purchasers are not warned or put upon inquiry as to any limitation in his authority in receiving subscriptions, the corporation should not be permitted to deny such authority. The purchaser has the right to assume that the agent is authorized to do those legal acts which the nature of his employment seem to warrant.¹⁴

§ 171. Condition as to Corporate Purposes.—A preliminary subscription to the stock of a corporation to be formed for a specified purpose is made upon the implied condition precedent that it be formed for that purpose alone. And the formation of a corporation for a particular purpose may be made a condition precedent to its right to recover on a subscription contract. Thus, one who subscribes for stock for the purpose of forming a corporation with the object of furnishing an incandescent system of electric lighting is not bound by his subscription, in the absence of consent or waiver of his rights, to a corporation formed for the purpose of producing electricity for light and power.¹⁵ Likewise, a subscription agreement for a corporation to be formed for the purpose of "acquiring and carrying on a general produce and merchandising business, etc.," cannot be enforced by a corporation with not only these but other and different purposes. The addition of the word "etc." in the subscription agreement is not sufficient to embrace a variety of purposes. A subscriber is not bound where the things embraced are not of a like character.¹⁶

13. Newark Trust Co. v. Kriebel, 33 Cal. App. Dec. 356, 193 Pac. 962.

14. Tidewater Southern Ry. Co. v. Merz, 35 Cal. App. 405, 169 Pac. 1054; Tidewater Southern Ry. Co. v. Harney, 32 Cal. App. 253, 162 Pac. 664. As to apparent au-

thority of agents generally, see AGENCY, vol. 1, p. 737 et seq.

15. Marysville etc. Power Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

16. Hanford Mercantile Store v. Sowleere, 11 Cal. App. 261, 104

§ 172. Condition as to Amount Subscribed.—Ordinarily it is not a condition precedent to the liability of subscribers that the full sum should be first subscribed,¹⁷ where there is nothing in the agreement to that effect;¹⁸ nor is it ordinarily a condition precedent to the formation of the corporation or consummation of the contract of membership that the entire capital provided by the articles or charter should be subscribed.¹⁹ But conditions may be inserted in the contract making the organization of the proposed corporation conditional upon the securing of subscriptions for a certain amount.²⁰ In such cases, unauthorized subscriptions cannot be counted in making up the requisite amount to be subscribed before organization.¹ And where the required amount is not subscribed absolutely, a portion of it being conditional otherwise than on the amount, the formation of the corporation prior to the subscription of the full amount is a defense to an action on the subscription,² for an organization prior to securing subscriptions for the required amount which is a clear departure from the scheme set out in the subscription operates to release the subscriber, at his option, from proceeding further in the business.³

Pac. 708. See ABBREVIATIONS, vol. 1, p. 84, as to abbreviation "etc."

17. Auburn Opera House Assn. v. Hill, 3 Cal. Unrep. 839, 32 Pac. 587.

18. West v. Crawford, 80 Cal. 19, 21 Pac. 1123.

19. Dallemand v. Odd Fellows' Sav. Bank, 74 Cal. 598, 16 Pac. 497.

20. California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; California Southern Hotel Co. v. Russell, 88 Cal. 277, 26 Pac. 105 (holding that no ratification subsequent to the

organization can affect the liability of another subscriber without his consent if the condition precedent to the organization is not complied with); Santa Cruz R. Co. v. Schwartz, 53 Cal. 106.

1. California Southern Hotel Co. v. Russell, 88 Cal. 277, 26 Pac. 105.

2. California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; California Southern Hotel Co. v. Russell, 88 Cal. 277, 26 Pac. 105.

3. Santa Cruz R. Co. v. Schwartz, 53 Cal. 106.

§ 173. Performance and Materiality of Conditions.—An offer or contract to become a shareholder or subscribe for shares does not become binding or create a liability until all conditions precedent upon which the offer or contract is made have been performed,⁴ for where the condition of a subscription is not performed, there is a failure of consideration.⁵ But the fact that an act has not been performed within a certain time in order to be available as a defense must have been a condition agreed upon between the parties.⁶ And, to operate as a condition, the provision must be material. Thus, the name which the corporation adopts or the number of shares into which its capital is divided are not material to the subscriber, but conditions as to cost of the shares subscribed for are material, and as to such conditions the subscriber can stand upon the terms of his contract and refuse to accept shares not complying with them.⁷

§ 174. Agreement to Repurchase Stock.—A stipulation between a corporation and a purchaser of its stock whereby the subscriber is, upon certain conditions, entitled to return the stock and receive his money, and by which the corporation agrees to repurchase the stock, is a part of the consideration upon which the contract is made. The sale of stock under such a contract is conditional, and the subscriber does not become a stockholder except subject to the qualification that he may return his shares on the stipulated terms.⁸ And the same doctrine applies

4. Marysville etc. Power Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

5. Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

6. Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772.

7. Mahan v. Wood, 44 Cal. 462.

The difference of the name of the corporation to be organized is of no importance where it is really the

corporation contemplated by the original contract and is in fact intended to serve the same purpose; Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. 867.

8. Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582; Williamson v. Marshall, 35 Cal. App. Dec. 875, 200 Pac. 1058 (holding that where

where the agreement is collateral, as where a note is given for the stock upon the reservation that it will be returned if the subscriber is not satisfied with his stock.⁹ Such an agreement by a corporation obligating it, at the election of the stockholder, to repurchase the stock at a stated price, is not within the inhibition of section 309 of the Civil Code, and is enforceable against the corporation, subject to the qualification that the rights of creditors are not injuriously affected, and that it would not result in a fraudulent invasion of the rights of other stockholders.¹⁰

the defendants cannot be disassociated from the corporation, their liability should be measured by the rules of accountability as though the corporation itself were the defendant); *Fulmele v. Los Angeles Inv. Co.*, 34 Cal. App. Dec. 533, 196 Pac. 923 (holding that even a contract to redeem and repurchase the stock "at any time" may be enforced if the purchaser elects to take advantage of such option within a reasonable time); *Newark Trust Co. v. Kriebel*, 33 Cal. App. Dec. 356, 193 Pac. 962; *Dickinson v. Zubiarte Min. Co.*, 11 Cal. App. 656, 106 Pac. 123 (holding that the value of the stock is immaterial, since the right to repayment does not depend on its value; it is likewise immaterial whether or not the corporation accepts the subscriber's tender of return of the stock).

As to the effect and construction of agreements to repurchase stock as between individuals, see *Flickinger v. Wrenn Inv. Co.*, 172 Cal. 132, 155 Pac. 627; *Fites v. Marsh*, 171 Cal. 487, 153 Pac. 926; *Kilbride v. Moss*, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812; *Alexander v. Bosworth*, 26 Cal. App. 589, 147 Pac. 607; *Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac.

1082; *Jenkins v. Marsh*, 22 Cal. App. 8, 132 Pac. 1051; *Scott v. Goodin*, 21 Cal. App. 178, 131 Pac. 76; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926; *Howard v. Galbraith*, 13 Cal. App. 373, 109 Pac. 889. And see note, 1 Cal. Law Rev., p. 267.

9. *Tidewater Southern Ry. Co. v. Merz*, 35 Cal. App. 405, 169 Pac. 1054; *Tidewater Southern Ry. Co. v. Harney*, 32 Cal. App. 253, 162 Pac. 664 (holding that the fact that such collateral agreement was the controlling consideration for the note may properly be shown by parol); *Tidewater Southern Ry. Co. v. Vance*, 31 Cal. App. 503, 160 Pac. 1097.

10. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582. See *Tidewater Southern Ry. Co. v. Vance*, 31 Cal. App. 503, 160 Pac. 1097, holding that no rights of subsequent subscribers or creditors must be involved, and there must be no secrecy in respect to the agreement; but the corporation cannot claim secrecy in the agreement where whatever secrecy existed was imparted through the act or neglect of its own authorized agent. And

But such an agreement is not to be denounced as a fraud on other subscribers and creditors where it is not shown that any fraudulent invasion of their rights has been attempted or would result.¹¹ In a case where the corporation had ceased to do business and had sold its property and was about to dissolve and apparently had a large residue of money to distribute pro rata among its stockholders, it has been held that so far as the corporation was concerned, there was no necessity for or propriety in the repurchase of any stock.¹²

§ 175. Waiver of Conditions.—A subscriber to stock may waive any defense he may have to a subscription, either expressly or by his acts and declarations; but the waiver must be voluntary, implying a knowledge of the right, claim or thing waived.¹³ And so, where one signed a prospectus of an opera house and pavilion association which stated, among other things, that the building was “to be built by a corporation with a capital stock of twenty thousand dollars,” etc., it has been held that this was not a condition precedent to the subscriber’s liability, but, were it otherwise, the subscriber had waived the objection by his acts as a director and promoter of the corporation.¹⁴ A waiver of the condition precedent may likewise

see *Barnard v. McIntire*, 31 Cal. App. Dec. 51, 187 Pac. 440, holding that where a subscriber had waived his right to rescind his subscription within a given time, the corporation could not thereafter gratuitously grant him such right at the expense of a creditor of the corporation.

11. *Newark Trust Co. v. Kriebel*, 33 Cal. App. Dec. 356, 193 Pac. 962.

12. *Millott v. Assn. of Mare Island Employees*, 62 Cal. Dec. 410, 201 Pac. 118 (where articles provided that all stock should be sold subject to the condition that the

corporation might call in, on payment of the specified price and interest, any stock held by a stockholder in excess of ten shares).

13. *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859, holding that whether the party had knowledge of the thing waived is a question for the jury; and see *infra*, §§ 177–180.

14. *Auburn Opera House etc. Assn. v. Hill*, 3 Cal. Unrep. 839, 32 Pac. 587; see on second appeal, same case, 113 Cal. 382, 45 Pac. 695.

be effected by payment of calls on the subscription.¹⁵ And a subscriber's right under a condition that he may rescind within a given time may be lost by lapse of the time specified or by express waiver.¹⁶ It may be noted also that where a subscription is conditional upon the issuance of bonds, nevertheless, such condition is waived by the voluntary acceptance of notes in lieu of the proposed bonds.¹⁷ And one may be held liable as a stockholder who accepts stock in a corporation whose purposes are at variance with those set out in his subscription agreement, irrespective of such agreement.¹⁸ Where one accepts stock and pays part of the subscription price with complete knowledge that the corporation is formed by others than the persons who signed the subscription agreement, he thereby admits that the corporation is the one contemplated and is liable for an unpaid balance.¹⁹

Subscriptions or Sales Induced by Fraud.

§ 176. In General.—Contracts with corporations in regard to their stock, like other contracts, are subject to the defense that they were procured through fraud or misrepresentation.²⁰ Thus, a misrepresentation as to the profits which are being derived from the business is ground for action by a purchaser of stock for the recovery of his money.¹ Likewise, the contract may be set aside as fraudulent for false statements as to price paid and false representations that other persons have subscribed upon the same terms;² or misrepresentations to the

15. California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

16. Barnard v. McIntire, 31 Cal. App. Dec. 51, 187 Pac. 440.

17. Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

18. Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136.

19. Ferrochem Co. v. Danziger, 23 Cal. App. 584, 138 Pac. 966.

20. See cases cited *infra*, this section; and see *infra*, §§ 177-180. And see CONTRACTS; FRAUD AND DECEIT; SALES.

1. Dox v. R. E. Lomax Co., 29 Cal. App. 718, 156 Pac. 874.

2. Munson v. Fishburn, 183 Cal. 206, 190 Pac. 808.

effect that certain persons, upon whose integrity and business capacity the subscriber relies, are connected with the corporation.³ So also a representation that stock is non-assessable is held to be an assurance that the corporation has taken such steps as are necessary effectually to waive the right to levy assessments; and this representation is one of fact and not of law, and, if false, entitles the purchaser to rescind.⁴ But statements concerning the happening of future events cannot be relied upon to avoid subscriptions, since necessarily they are matters of opinion only.⁵

Actionable misrepresentations by a stock sales agent are chargeable to the corporation,⁶ and it is only necessary that the agent has authority to negotiate a sale of the stock, for the authority to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property.⁷ It has been held, however, that an officer of a corporation who negotiates a sale of stock is not necessarily an agent of the company in the transaction, especially where it appears that the number of shares contracted for exceeds the number remaining in the treasury of the company. Where there is evidence that the vendor of the stock did not act as the agent of the corporation in the execution of the contract, the fact that he made an unauthorized disposition of certain stock held by him in trust would not compel the conclusion that the contract was entered into by him as agent for the company.⁸

3. *Vulcan Fire Ins. Co. v. Jorgensen*, 33 Cal. App. 763, 166 Pac. 835.

4. *Merchants Realty etc. Co. v. Kelso*, 31 Cal. App. Dec. 517, 189 Pac. 116; *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544.

5. *Jefferson v. Hewitt*, 95 Cal. 535, 30 Pac. 772.

6. *Dox v. R. E. Lamax Co.*, 29 Cal. App. 718, 156 Pac. 874.

7. *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544. See SALES.

8. *Sterilization Company v. Tucker*, 34 Cal. App. 571, 168 Pac. 372.

§ 177. Rescission and Other Remedies.—In case a subscription contract is induced by fraud, it is not necessary for the subscriber to resort to an independent action for damages.⁹ The subscriber who rescinds must act promptly upon discovering the facts which entitle him to rescind, provided he is free from duress, menace, undue influence or disability, and is aware of his right to rescind.¹⁰ Rescission immediately upon discovering the falsity of representations is prompt rescission.¹¹ But a delay of six to ten months,¹² or even three months after discovery, is too long. The language of the statute is mandatory as to promptitude of the plaintiff after discovery of the fraud.¹³ The subscriber cannot speculate upon the chance of profit notwithstanding the fraud and thereafter rescind; but is put to his election at once whether to stand upon the contract.¹⁴ If he delays in making his choice, such delay must be amply excused or else he is deemed to have

9. *Tidewater Southern Ry. Co. v. Merz*, 35 Cal. App. 405, 169 Pac. 1054; *Tidewater Southern Ry. Co. v. Harney*, 32 Cal. App. 253, 162 Pac. 664.

As to the methods by which a party to a contract who is defrauded may obtain relief, see CANCELLATION OF INSTRUMENTS, vol. 4, p. 756; CONTRACTS, ante, p. 389. See *Field v. Austin*, 131 Cal. 379, 63 Pac. 692, setting forth the three methods of obtaining relief.

10. See Civ. Code, § 1691; *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107; *Fulmele v. Los Angeles Inv. Co.*, 34 Cal. App. Dec. 533, 196 Pac. 923; *Maginess v. Western Securities Corp.*, 38 Cal. App. 56, 175 Pac. 277.

See note, 5 A. L. R. 255, as to rescission of sale of corporate stock on the ground of mutual mistake due to error in corporate books.

11. *Vulcan Fire Ins. Co. v. Jorgensen*, 33 Cal. App. 763, 166 Pac. 835.

12. *Maginess v. Western Securities Corp.*, 38 Cal. App. 56, 175 Pac. 277.

13. *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107. See *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779, holding that where the exercise of reasonable diligence would have disclosed all that he subsequently learned, for the purposes of the statute of limitations, the means of knowledge and circumstances putting one on inquiry will be held equivalent to knowledge of what could have been readily ascertained by such inquiry.

14. *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107; *Maginess v. Western Securities Corp.*, 38 Cal. App. 56, 175 Pac. 277.

waived his right to have the contract avoided.¹⁵ In a notice of rescission where it is stated that the reason for the action is that the subscription has been obtained by misrepresentation and fraud, it is not necessary that the specific misrepresentations complained of should be enumerated.¹⁶

§ 178. Restoration of Value Received.—In the absence of an averment showing the stock to be worthless or that the corporation is unable or has, upon tender of the stock, refused to return the consideration received therefor, an allegation showing compliance with the statutory provision as to restoration or offer to restore everything of value received is essential to a statement of a cause of action for rescission.¹⁷ Failure to restore or offer to restore the consideration will prevent recovery,¹⁸ except, however, that one is not required to restore that which, in any event, he would be entitled to retain.¹⁹ But where the stock is wholly worthless, the transaction may be rescinded without a return thereof.²⁰ If a rescission is alleged it must have been effected prior to the commencement of the action;¹ a tender or offer in the complaint is not sufficient.² To make an offer to restore, however, it is not necessary that one should have previously had issued to him or have in his possession the certificate for the stock.³ And it has

15. See *infra*, § 179.

16. *Vulcan Fire Ins. Co. v. Jorgensen*, 33 Cal. App. 73, 166 Pac. 835.

17. *Fairchild v. Western Securities Corp.*, 176 Cal. 742, 169 Pac. 363; *Majors v. Girdner*, 31 Cal. App. 47, 159 Pac. 826 (it is presumed that stock is of some value, being property).

18. *Fairchild v. Western Securities Corp.*, 176 Cal. 742, 169 Pac. 363; *Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 463, 86 Pac. 817.

19. See *Matteson v. Wagoner*, 147

Cal. 739, 82 Pac. 436, overruling *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107.

20. *Field v. Austin*, 131 Cal. 379, 63 Pac. 692.

1. *Maginess v. Western Securities Corp.*, 38 Cal. App. 56, 175 Pac. 277.

2. *Fairchild v. Western Securities Corp.*, 176 Cal. 742, 169 Pac. 363; *Maginess v. Western Securities Corp.*, 38 Cal. App. 56, 175 Pac. 277.

3. *Majors v. Girdner*, 31 Cal. App. 47, 159 Pac. 826 (it is sufficient if the subscriber is the owner of the

been held that a condition in the offer to rescind that the corporation shall return money paid on assessments is fatal to the validity of the rescission.⁴ Where the corporation has undertaken to issue shares upon payment of the balance of the purchase price, the contingent obligation is ipso facto canceled by rescission of the subscription, and the corporation is thereby placed in the same position as if stock issued by it had been returned by the subscriber. The subscriber, having received nothing in such case, can return nothing.⁵

§ 179. Defenses to Rescission.—A subscriber entitled to relief may either avoid the transaction or confirm it, but he cannot do both; if he adopts a part, he adopts it all; he must reject it entirely if he desires to obtain relief upon the ground of rescission.⁶ Where the right is given to a corporation to rescind a subscription within a certain time, this right may be lost by the subscriber by express waiver or by the lapse of the time limited.⁷ Hence, where the subscriber, after discovery of the fraud, attends meetings of the stockholders, votes his stock and pays assessments thereon, without objection, this is in effect an affirmation of the contract which will prevent rescission.⁸ And even if the subscriber gives a proxy whereby he causes his stock to be voted at the annual meeting of stockholders, this is a fact upon which the court may be justified in sustaining the defenses of laches and ratification.⁹ In the

stock and in a position to demand delivery of the certificate).

4. *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107 (overruled on another point in *Matteson v. Wagoner*, 147 Cal. 739, 82 Pac. 436).

5. *Vulcan Fire Ins. Co. v. Jorgensen*, 33 Cal. App. 763, 166 Pac. 835.

6. *Fulmele v. Los Angeles Inv. Co.*, 34 Cal. App. Dec. 533, 196 Pac. 923 (subscriber should not be

permitted to enforce his right to rescind while at the same time exercising his voting rights as a stockholder). See, also, cases cited *infra*.

7. *Barnard v. McIntire*, 31 Cal. App. Dec. 51, 187 Pac. 440. And see cases cited *infra*.

8. *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107.

9. *Fulmele v. Los Angeles Inv. Co.*, 34 Cal. App. Dec. 533, 196 Pac.

same way, where a subscriber enters into a contract for resale of the stock on the basis that he is the owner thereof, he thereby elects to stand upon the original contract and cannot thereafter disaffirm or rescind it.¹⁰ But payment of assessments after discovery of the fraud is not an affirmance of the transaction which will bar a cause of action for rescission, if made for no other reason than to preserve the property so that the subscriber may be in a position to tender it back if he should later seek rescission.¹¹

§ 180. Rescission After Insolvency.—It is the rule in California that a subscription to stock induced by fraud may be rescinded after, as well as before, the corporation ceased to be a going concern, where no considerable time has elapsed since the subscription and no want of diligence appears in discovering the fraud and the existence of the fraud is clear.¹² The English rule is that a subscriber cannot, after proceedings have been commenced for winding up the corporation, rescind his subscription on account of fraud, even though he did not discover the fraud until after commencement of the proceedings and despite diligence on his part, the rights of creditors then prevailing over the equities of the subscriber. While in this country there is a conflict of authority, the better rule is that where the right to rescind is denied, it is not because of the mere fact of insolvency, but for the reason that the subscriber has participated in the management of the insolvent corporation, or for some other particular cause that would create an estoppel or upon some doctrine analogous to the equi-

923 (by bringing an action for rescission he waives his right to recover upon the contract itself, and cannot in such action enforce any of its terms).

10. *Maginess v. Western Securities Corp.*, 38 Cal. App. 56, 175 Pac. 277.

11. *Munson v. Fishburn*, 183 Cal. 206, 190 Pac. 808.

12. *People v. California Safe Deposit etc. Co.*, 19 Cal. App. 414, 126 Pac. 516, 520 (citing and discussing the authorities on this and the contrary rule). See note, 1 Cal. Law Rev. 59.

table doctrine of laches.¹³ Diligence is one of the essential things for the subscriber to show,¹⁴ although there is doubt as to whether it is necessary for the complaint to state facts showing reasonable diligence to discover the fraud.¹⁵

Withdrawal or Cancellation of Subscription.

§ 181. **In General.**—The general rule is that a stockholder may not be released from liability on his contract of subscription without the consent of his fellow-stockholders as well as that of the creditors of the corporation. The reason for the rule is found in the doctrine that the subscribed capital stock, paid and unpaid, is a trust fund which the stockholders and creditors have the right to insist shall not be diminished or impaired without their consent.¹⁶ The corporation cannot gratuitously afford a subscriber the right to rescind his subscription at the expense of a creditor,¹⁷ unless his subscription was obtained by means of fraud.¹⁸ And the agreement by a solvent stockholder for cancellation, even where consented to by all other stockholders, will not prevent creditors from having recourse against retiring stockholders to compel con-

13. *People v. California Safe Deposit etc. Co.*, 19 Cal. App. 414, 126 Pac. 516, 520, per Kerrigan, J. (where it was said that the rule might be otherwise if it appeared that a creditor had given credit on the faith of the sale of the particular stock, but that in such case the right would be a personal one not inuring to the benefit of all the creditors generally, even if it did exist); *Wallace v. Bacon*, 86 Fed. 553 (case arising in California). See *People v. California Safe Deposit etc. Co.*, 175 Cal. 756, L. R. A. 1918A, 1151, 167 Pac. 388, as to right to follow money paid, as a trust fund.

14. *Wallace v. Bacon*, 86 Fed. 553.

15. *People v. California Safe Deposit etc. Co.*, 19 Cal. App. 414, 126 Pac. 516, 520 (opinion of supreme court upon denial of motion for rehearing in that court).

16. *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046. See *infra*, § 302.

17. *Barnard v. McIntire*, 31 Cal. App. Dec. 51, 187 Pac. 440 (holding that when provision to that effect had lapsed, the board of directors could not permit rescission); *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046.

18. See *supra*, § 177 et seq.

tribution for the balance unpaid on their subscriptions. But only a creditor can be damaged by cancellation of the subscription liability, and if this liability remains with the subscriber after his withdrawal for the benefit of nonconsenting creditors, that is all that creditors have any right to insist upon.¹⁹

§ 182. Right as to Others Than Existing Creditors—Limitations of Right.—As against all but existing creditors, a corporation may cancel,²⁰ modify or annul,¹ a subscription contract, especially if the cancellation relates to but a portion of the shares subscribed for;² but this may be done only with the unanimous consent of the stockholders,³ unless the subscription was obtained by fraud or mistake.⁴ The subscription may be canceled by the board of directors duly authorized thereto by the stockholders,⁵ but even where the cancellation is by order of the directors the intended effect cannot follow without the unanimous consent of the stockholders.⁶ The power being in the stockholders, it cannot be exercised by directors in the absence of express authority given by the charter or bylaws of the corporation; but an exception is recognized to the extent of admitting that the directors may make compromises with the subscribers whose liability is questioned, who are insolvent, or are of doubtful financial responsibility, such compromises usually taking the form of an agree-

19. *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046.

20. *Pasadena Rapid Transit Co. v. Munson*, 37 Cal. App. 352, 174 Pac. 109; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046 (valid as to future creditors).

1. *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172.

2. *Pasadena Rapid Transit Co. v. Munson*, 37 Cal. App. 352, 174 Pac. 109.

3. *Silica Brick Co. v. Winsor*, 171 Cal. 18, 151 Pac. 425; *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046.

4. *Silica Brick Co. v. Winsor*, 171 Cal. 18, 151 Pac. 425; *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542. See *supra*, § 176 et seq.

5. *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172.

6. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542.

ment for the payment for a portion of the shares and a release of subscription as to the remainder.⁷ The mere act of canceling an unissued certificate does not effect a cancellation of the subscription for the stock; it tends to prove nothing more than that, for some reason satisfactory to the persons canceling the certificate, it was thought unnecessary or improper to issue it at that time.⁸ Release of a subscription may be proved not only by the records, but as well by the acquiescence of the stockholders and by the fact that the corporation did not regard the subscription as binding.⁹ But while it is true that stockholders may, by their acquiescence, ratify a release which the directors have given,¹⁰ yet, where it does not appear that the stockholders knew of the arrangement, no ratification is shown. Thus, where an agreement for the surrender of stock to the corporation omits to mention the cancellation of the stock subscription as a consideration, the subscriber cannot assert that it was a part of the transaction.¹¹

“Blue-sky” Regulations.

§ 183. **In General.**—The first so-called “blue-sky law” in California regulating the subscription and sale of corporate stock and other securities was the Investment Companies Act of 1913.¹² This act was not wholly satisfactory as a preventive of fraudulent stock sale schemes, inasmuch as it applied only to the issue of securities offered on original sale by the issuing company, and was easily circumvented by the organization of the corporation in an-

7. *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046. *v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046.

8. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542.

9. *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172.

10. *Silica Brick Co. v. Winsor*, 171 Cal. 18, 151 Pac. 425; *Thomas*

11. *Silica Brick Co. v. Winsor*, 171 Cal. 18, 151 Pac. 425.

12. Stats. 1913, p. 715, approved by the people at the general election held in November, 1914.

See note, 15 A. L. R. 262, as to blue-sky laws generally.

other state, the issuance of all of the stock to persons in such other state, and the subsequent resale of the stock in California, such resale not being within the jurisdiction of the corporation commissioner. This defect was remedied by the passage of the Corporate Securities Act of 1917,¹³ popularly known as the "blue-sky law,"¹⁴ which, in addition to giving jurisdiction over resales of corporate securities, extended jurisdiction over agents and brokers dealing in corporate securities. This act regulates the sale of securities of ordinary corporations for profit, the word "security" including not only shares of stock, but likewise bonds and evidences of right to participate in profits or assets as well as certificates of participation in voluntary trusts.¹⁵ The beneficent object of the Corporate Securities Act is to prevent fraud in the sale of corporation stock.¹⁶ The act forbids any company to sell, except for delinquent assessments, or to offer for sale, negotiate for the sale of or take subscriptions for any security of its own issue until it has secured a permit from the commissioner of corporations authorizing it so to do,¹⁷ and forbids the sale of securities without exhibiting to the prospective purchaser a copy of the certificate issued by the commissioner in accordance with the provisions of the act.¹⁸

13. Stats. 1917, p. 673. And see Stats. 1919, p. 231, amending § 2 thereof; and Stats. 1921, p. 1114, amending §§ 2, 20, 25, thereof. This act in so far as it did not add to, take from or alter the former act, as amended in 1915, is specifically to be construed as a continuation thereof. (See § 26 of Corporate Securities Act.)

14. *In re Girard*, 62 Cal. Dec. 245, 200 Pac. 593; *Jose v. Utley*, 61 Cal. Dec. 589, 199 Pac. 1037; *Pitman v. Walker*, 33 Cal. App. Dec. 779 (opinion of district court of

appeal; rehearing in supreme court, 63 Cal. Dec. 29, 203 Pac. 739).

15. Corporate Securities Act, § 2.

16. *Pitman v. Walker*, 33 Cal. App. Dec. 779 (opinion of district court of appeal; rehearing in supreme court, 63 Cal. Dec. 29, 203 Pac. 739).

17. Corporate Securities Act, § 3.

18. *Pitman v. Walker*, 33 Cal. App. Dec. 779 (opinion of district court of appeal; rehearing in supreme court, 63 Cal. Dec. 29, 203 Pac. 739).

Upon the filing of an application and examination by the commissioner, if he finds that the proposed plan of business of the applicant is not unfair, unjust or inequitable, that it intends to transact its business fairly and honestly and that the securities it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, he is required to issue a permit authorizing the corporation to issue and dispose of securities in California in such amounts and for such considerations and upon such terms and conditions as he shall provide in the permit, and he may establish such rules and regulations as may be reasonable and necessary to insure the disposition of the proceeds in the manner and for the purposes provided in the permit.¹⁹ The act of 1917 has been held to be constitutional,²⁰ but even though the act were unconstitutional, it has been said that an injunction would not lie upon the asserted ground of unconstitutionality to restrain the prosecution of a person for advertising stock for sale in violation of the act, where the stock issue was fraudulent and the plaintiff is involved in a fraudulent transaction.¹

§ 184. Validity of Unauthorized Subscription and Issue.

Under the first blue-sky act, prior to obtaining a permit from the commissioner of corporations no valid subscription could be made, except for qualifying shares, consequently any attempt to subscribe for stock in excess of the

19. Corporate Securities Act, § 4; *Winters v. Lindsay*, 34 Cal. App. Dec. 875, 198 Pac. 43. See *Nannizzi v. Caprile*, 30 Cal. App. Dec. 135, 185 Pac. 673, where an agreement had been made to dissolve a partnership and to transfer the property to a corporation in exchange for stock to be issued by the corporation, and where it was said that if the incorporators have

obeyed the law, they will be entitled to the permit from the commissioner of corporations.

20. *In re Girard*, 62 Cal. Dec. 245, 200 Pac. 593.

1. *Jose v. Utley*, 61 Cal. Dec. 589, 199 Pac. 1037 (where it was manifest that issuance of the stock was fraudulent against creditors and stockholders).

original qualifying shares resulted in no subscription.² Under the present act, subscriptions for shares of a domestic corporation made prior to the incorporation and set forth in the articles are not prohibited, but such subscriptions must be deemed to have been made and accepted upon the condition that the corporation, when incorporated, shall with reasonable diligence apply for and secure a permit authorizing the issuance of the shares so subscribed for in accordance with such subscriptions.³ Any security issued by any company without the permission of the commissioner is void; and every security issued with his authorization, but not conforming to the provisions required by the permit is void.⁴ The act of 1913, however, did not contain any clause, such as is found in the present act, declaring void all securities issued without complying with the requirements as to obtaining a permit or for a violation of its conditions, hence an issue under the act of 1913, although in violation of the conditions of the permit, was not void or subject to collateral attack. However, such issue might subject the officers of the corporation to the penalties of the law as otherwise provided in the act.⁵

§ 185. Sale of Interest in Voluntary Trust.—The Corporate Securities Act declares that the word “company” includes all domestic and foreign private corporations, associations, joint stock companies, and partnerships, of every kind, and also trustees, as defined by the act.⁶ The word “trust,” as used in the act, includes all voluntary trusts as the same are defined in the Civil Code, expressly

2. *Nannizzi v. Caprile*, 30 Cal. App. Dec. 135, 185 Pac. 673. See Investment Companies Act, § 5.

3. Corporate Securities Act, § 25 (as amended, Stats. 1921, p. 1114).

4. Corporate Securities Act, § 12 (as amended in 1921). See *American Bond etc. Co. v. Lindsay*, 31 Cal. App. Dec. 1074, 190 Pac.

192 (under act of 1913). See, also, opinion of district court of appeal in *Pitman v. Walker*, 33 Cal. App. Dec. 779 (rehearing in supreme court granted, 63 Cal. Dec. 29, 203 Pac. 739).

5. *Winters v. Lindsay*, 34 Cal. App. Dec. 875, 198 Pac. 43.

6. Stats. 1917, p. 673, § 2, subd. 3.

created by or declared in an instrument in writing other than a will or judicial writ, order, decree, or judgment, to carry on any business or to secure the payment or repayment of money;⁷ and the word "trustee" includes only persons or companies executing such trusts,⁸ except, however, trustees of a testamentary trust or a trust established by judicial decree, where in such capacity they lawfully dispose of any property.⁹ Hence, the sale without a permit from the corporation commissioner, of unit shares or unit interests in a trust representing a proportional interest in the property held by the trustees in pursuance of the declaration of trust, is in violation of the act.¹⁰ The act is not unconstitutional as discriminating between a sale of securities by trustees created by a will or by an order of court in a judicial proceeding and a sale in a case of a trust created under an instrument executed between individuals.¹¹

IX. TRANSFERS OF STOCK.

In General.

§ 186. Statutory Provisions.—Section 324 of the Civil Code provides in part as follows:

"Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock, except as hereinafter provided, are personal property, and may be transferred by indorsement by signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation

7. Stats. 1917, p. 673, § 2, subd. 4.

8. Stats. 1917, p. 673, § 2, subd. 5.

9. Stats. 1917, p. 673, § 2, subd. 9, as amended by Stats. 1919, p. 231. Before the amendment in 1919, the exception was of "Any trustee,

who, in such capacity, lawfully disposes of any property."

10. In re Girard, 62 Cal. Dec. 245, 200 Pac. 593; Stats. 1917, p. 673, § 3.

11. In re Girard, 62 Cal. Dec. 245, 200 Pac. 593.

as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer; . . .

"Whenever any officer of any corporation shall refuse to make entries upon the books thereof, or to transfer stock therein, or to issue a certificate or certificates therefor to the transferee as provided by this and the next preceding section, such officer shall be subject to a penalty of four hundred dollars, to be recovered as liquidated damages, in an action brought against him by the person aggrieved."¹²

These code provisions are based upon earlier statutes regarding the validity of transfers not entered upon the books of the corporation.¹³

§ 187. Purpose of Statute.—It has been said that the provision of the statute as to the invalidity of transfers not entered upon the books of the corporation, was not designed as a protection to the company alone;¹⁴ that the legislature intended to protect the public from the frauds which might be perpetrated by a sale or hypothecation of the certificates passing the legal or equitable title, while the books of the company induced credit to the vendor by holding him out to the world as the owner of such stock.¹⁵ But the doctrine that the stock and transfer books of a

12. See *supra*, § 155 et seq., as to issue of certificates referred to above as provisions of "next preceding section," viz., Civ. Code, § 323; and see *infra*, §§ 216, 217, as to provisions of § 324, relating to water companies, which are omitted from the above quotation.

13. Stats. 1862, p. 111; Stats. 1861, p. 607, § 12; Stats. 1853, p. 169, § 13; Stats. 1853, p. 85, § 9; Stats. 1862, p. 199, § 21.

14. *Weston v. Bear River etc. Co.*, 5 Cal. 186, 63 Am. Dec. 117 (construing act of April 22, 1850, Stats. 1850, p. 347, § 12, which is

identical with Civ. Code, § 324). But see *infra*, §§ 227, 228, for discussion of the rule in the *Weston* case and later decisions and as to the overruling of that case in 6 Cal. 425; *Strout v. Natoma etc. Min. Co.*, 9 Cal. 78 (following *Weston v. Bear River etc. Co.*, 5 Cal. 186, 63 Am. Dec. 117, but mis-citing the report as "6 Cal. 425." See *infra*, §§ 228, 229, for discussion of the *Western* cases); *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

15. *Weston v. Bear River etc. Co.*, 5 Cal. 186, 63 Am. Dec. 117.

corporation are public records, accessible to all persons and intended to give notice to everybody of the status and ownership of the title to the stock is discredited by the later decisions.¹⁶ Moreover, under the code only stockholders and creditors have the right to inspect the books.¹⁷

§ 188. Right to Transfer Shares.—The *jus dispondendi* in shares of stock is an incident of ownership and may be exercised in any manner not prohibited by law.¹⁸ Corporate stock does not derive its transferability from section 324 of the Civil Code, for such stock would be transferable without such provision.¹⁹ However, the recital in a certificate that the stock is transferable only on the books of the company and on surrender of the certificate serves to give notice of the rights of the corporation under the statute with respect to transfers, although it does not change the relative rights of stockholders and third persons with respect to each other.²⁰ Generally

16. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 76 (where the cases are reviewed).

17. Civ. Code, § 378; *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676. See *infra*, § 248, as to persons having right to inspect books.

18. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55. See *Bank of Visalia v. Smith*, 146 Cal. 398, 81 Pac. 542, where it is said that in the absence of any restriction upon their alienability, either in the articles of incorporation or in the by-laws, shares are transferable by indorsement of the owner and delivery of the certificate.

19. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54; *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55. See Civ. Code, § 1044.

A by-law will not have the effect of restricting the right to transfer stock in the mode prescribed by section 324; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359. See *supra*, § 186, where statute is set out.

20. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852 (the recitals in the cer-

speaking, the law places no restriction upon the right of a stockholder to transfer his stock so long as the corporation is solvent;¹ and there is no rule which precludes an owner of stock even in an insolvent corporation from transferring it to whomsoever he pleases. Stock in such a corporation may possess little, if any, intrinsic value, but it is nevertheless property and its transfer carries with it whatever rights would accrue to the original owner thereof. But, of course, a stockholder could not, by the transfer, avoid his liability for his share of the debts of the corporation.²

§ 189. Non-negotiability of Certificates.—A certificate reciting that one is the owner of shares of stock in a corporation is not a promise or request for the payment of money nor does it contain any of the elements of such promise or request.³ Hence, whatever may be the rule in other jurisdictions, it is well established in California that certificates of stock are not negotiable instruments,⁴ either in the commercial sense or within the definition of the

tificate may give notice to a stockholder upon which to found an implied contract).

1. *Welch v. Sargent*, 127 Cal. 72; 59 Pac. 319; *People v. California Safe Deposit etc. Co.*, 18 Cal. App. 732, 124 Pac. 558.

2. *People v. California Safe Deposit etc. Co.*, 18 Cal. App. 732, 124 Pac. 558 (holding that if there are no directors or officers, the court may require the receiver of the insolvent corporation to perform the physical act of registering the name in the stock book).

3. *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

4. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175

Pac. 457; *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Kohn v. Sacramento etc. R. Co.*, 168 Cal. 1, 141 Pac. 626; *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Craig v. Hesperia Land etc. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10; *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110, 13 L. R. A. 605, 27 Pac. 33; *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 22 Pac. 665; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282.

Civil Code,⁵ nor are they securities for money in any sense.⁶ In analogy to other non-negotiable instruments, therefore, the transferee of certificates of stock takes them subject to all equities of the corporation,⁷ the rule of caveat emptor applying to their transfer as to the transfer of other kinds of personal property.⁸ But the statute has placed the certificates in so far on the footing of negotiable instruments that if hypothecated before an attachment lien accrues, one who purchases at the execution sale without notice of the hypothecation will acquire a valid title as against the pledgee.⁹

§ 190. Title of Finder or Thief.—Certificates of stock being non-negotiable instruments, neither the finder of an indorsed certificate of stock, nor his vendee acquires any right to the stock,¹⁰ even though the vendee is a bona fide purchaser for value.¹¹ But where an owner loses stock certificates, the burden is upon him to show that the identical certificates lost by him were found by the defend-

5. *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 22 Pac. 665; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412. See NEGOTIABLE INSTRUMENTS.

6. *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282.

7. *Kohn v. Sacramento etc. R. Co.*, 168 Cal. 1, 141 Pac. 626; *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; *Craig v. Hesperian Land etc. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10; *Barstow v. Savage Min.*

Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349. See *infra*, §§ 813, 349, as to liability of stock to assessment for subscription calls.

8. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457; *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Craig v. Hesperia Land & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

9. *Weston v. Bear River etc. Co.*, 6 Cal. 425, as explained in *Winter v. Belmont Min. Co.*, 53 Cal. 428 (construing a provision in the corporation acts of 1850 and 1853 substantially the same as § 324, Civil Code).

10. *Craig v. Hesperia Land & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

11. *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412.

ant.¹² And where stock certificates properly indorsed are stolen from the holder thereof without fault, the thief acquires no title and can pass none, and the holder may pursue his property.¹³ The general rule that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, applies in California to the case of an innocent purchaser of stolen stock certificates.¹⁴ A bona fide purchaser of certificates of stock from a thief or one who has no title and no authority to sell cannot rely for his protection upon the negligence of the true owner, unless he shows that he was misled by such negligence.¹⁵

Persons Who may Transfer.

§ 191. Married Women.—Section 325 of the Civil Code, as amended in 1905, provides in part:

“Shares of stock in corporations standing on the books of the corporation in the name of a married woman may be transferred by her, her agent or attorney, without the signature of her husband, and in the same manner as if such married woman were a feme sole. . . .”

Prior to the amendment of 1905, this section provided that such stock as was “held or owned” by a married woman could be so transferred. The code commissioner’s note to the section states that the amendment was designed to make it clear that shares of stock standing in the name of a married woman are presumed to be her separate

12. *McFadden v. Goettert*, 131 Cal. 333, 63 Pac. 477. See *LOST INSTRUMENTS*.

13. *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

14. *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110, 13 L. R. A. 605, 27 Pac. 33. See *Winter v. Belmont Min. Co.*, 53 Cal. 428, apparently contra, but really a case

where the thief had apparent authority to dispose of the stock or apparent ownership by reason of having the stock standing in his name as appears from the opinion in *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

15. *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

property, and that they may be dealt with by her as such, in the absence of proof and notice to the contrary.¹⁶ Under the old law, where a feme sole owned shares and afterwards married, a transfer by indorsement by herself and husband even, without a privy examination of the wife, was not sufficient, for the law made the acknowledgment of the wife a necessary part of any conveyance by her of her separate property.¹⁷ She could, however, by power of attorney, authorize an agent to make sales and transfers of the stock on her behalf.¹⁸

§ 192. Agents or Attorneys.—The statute in express terms permits the transfer of stock by indorsement by signature of the proprietor, his agent, attorney or legal representative, and delivery of the certificate,¹⁹ and married women may likewise transfer shares standing in their names through agents.²⁰ But an agent cannot secure a transfer of the stock of his principal merely by presenting his power of attorney and without any indorsement of the stock by the principal or by any person for him. The law requires an indorsement by signature to effect a valid transfer. And even where there is an indorsement of the agent's signature, without stating the name of the principal on whose behalf he gave his signature, this would not authorize the cancellation of the principal's certificate and the obliteration of all evidence of his ownership of the stock. The corporation is in no better position in case of a transfer by order of the agent without any indorsement than it would be if the agent should indorse the certificate by his own signature, without stating the name of his principal; and it may right-

16. *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271. 31 Cal. 629. See *HUSBAND AND WIFE*.

19. Civ. Code, § 324.

17. *Selover v. American etc. Commercial Co.*, 7 Cal. 266.

20. Civ. Code, § 325. See *supra*, § 191; *Dow v. Gould etc. Min. Co.*,

18. *Dow v. Gould etc. Min. Co.*, 31 Cal. 629.

fully demand evidence of authority to make a transfer before it permits it to be done.¹

§ 193. Executors or Administrators.—An executor or administrator with power to sell and having the property of his testator or intestate may sell stock of a corporation organized in California and vest title thereto in a purchaser, even though the executor or administrator is in another jurisdiction, and the title of such purchaser, as between the parties, is complete upon indorsement and delivery of the certificate.² Although an ancillary administrator has, under the law of California, the better right to the stock,³ nevertheless, in the absence of prior ancillary administration, the foreign administrator of a decedent stockholder has the right to the stock,⁴ and by comity an assignment by him is recognized.⁵ Although an executor is not entitled to a transfer to himself individually on the ground that he is owner having title to the shares, nevertheless the transfer of the shares on the books is a right to which an executor is entitled, irrespective of other privileges given him. He is entitled to have the stock transferred on the books to enable him to draw dividends, and the fact that he may vote the stock or be eligible to corporate office without a transfer on the books does not change the rule.⁶

§ 194. Nonresident Owners.—When shares of stock are owned by persons residing out of the state, the president,

1. Taft v. Presidio etc. R. Co., 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436.

2. Brown v. San Francisco Gas Light Co., 58 Cal. 426.

3. Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; Union Trust Co. v. Pacific Tel. & Tel. Co., 31 Cal. App. 64, 159 Pac. 820. See EXECUTORS AND ADMINISTRATORS.

4. Brown v. San Francisco Gas Light Co., 58 Cal. 426; Union Trust Co. v. Pacific Tel. & Tel. Co., 31 Cal. App. 64, 159 Pac. 820.

5. Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971.

6. London etc. Bank v. Aronstein, 117 Fed. 601, 54 C. C. A. 663 (construing and applying the law of California). See EXECUTORS AND ADMINISTRATORS.

secretary or directors of the corporation, before entering any transfer of such shares on the books or issuing a certificate therefor to the transferee, may require from the attorney or agent of such nonresident owner, or from the person claiming under the transfer, an affidavit or other evidence that such nonresident owner was alive at the date of the transfer. If such affidavit or other satisfactory evidence is not furnished, a bond of indemnity may be required, with two sureties satisfactory to the officers; or, if not so satisfactory, then one approved by a judge of the superior court of the county in which the principal office of the corporation is situated, conditioned to protect the corporation against any liability to the legal representatives of the owner of the shares in case of his or her death before the transfer. If the affidavit or other evidence or bond is not furnished when required, neither the corporation nor any officer thereof can be liable for refusing to enter the transfer on the books of the corporation.⁷ But the bond need not be required by the corporation in every case, as, for example, where the title of a purchaser of the stock of a domestic corporation from a foreign executor was complete and where it was not necessary to have letters issued in California to obtain a transfer on the books of the corporation.⁸

Mode of Transfer.

§ 195. In General.—Inasmuch as it is a rule that, as between the parties, shares of stock may be transferred by indorsement and the delivery of the certificate,⁹ the possession of a certificate indorsed in blank gives the holder all the indicia of absolute ownership.¹⁰ Where a gift of stock is made, there must be not only an intention to make the gift but a present vesting of title by indorsement and

7. Civ. Code, § 326.

9. Civ. Code, § 321.

8. *Brown v. San Francisco Gas Light Co.*, 58 Cal. 426.

10. See *infra*, § 210.

delivery of the certificate, whether the gift is one *causa mortis*,¹¹ or a gift *inter vivos*.¹² Where title has vested, the mere reservation of a life interest in the stock, or a subsequent retaking of the certificates,¹³ or a reservation expressly made of dividends on the stock,¹⁴ will not operate against the gift. So where title of a vendee has been perfected in a sale or exchange of stock, the mere rescinding of the agreement of sale or exchange does not alone and *ipso facto*, in the absence of an intent to effect a restoration of title solely by reason of the rescission, restore to either of the parties that which they may have parted with under the fully executed contract.¹⁵

§ 196. Indorsement and Delivery of Certificate.—The common practice of passing title to stock by delivery of the certificate with blank assignment and power has been repeatedly sanctioned. The fact that the blank assignment is not filled in is immaterial, and the party to whom the certificate so assigned is delivered is authorized to fill it up by writing a transfer and power of attorney over the signature.¹⁶ But possession merely of an unindorsed certificate of stock is not sufficient to establish transmission of title from the person named therein, his representatives or heirs.¹⁷ The in-

11. *Noble v. Learned*, 153 Cal. 245, 94 Pac. 1047; *Noble v. Garden*, 146 Cal. 225, 2 Ann. Cas. 1001, 79 Pac. 883.

12. *Calkins v. Equitable Building etc. Assn.*, 126 Cal. 531, 59 Pac. 30; *Coward v. De Cray*, 38 Cal. App. 290, 176 Pac. 56. See *GIFTS*.

13. *Coward v. De Cray*, 38 Cal. App. 290, 176 Pac. 56.

14. *Calkins v. Equitable Building etc. Assn.*, 126 Cal. 531, 59 Pac. 30.

15. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55. See *SALES*.

16. *Fowles v. National Bank of*

California, 167 Cal. 653, 140 Pac. 271; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84. See generally as to filling blanks, *ALTERATION OF INSTRUMENTS*, vol. 1, p. 1083.

17. *Nicholls v. Reid*, 109 Cal. 630, 42 Pac. 298 (holding that the true meaning of a contract to sell and deliver stock to purchasers under a statute such as section 324 of the Civil Code is that the party is to convey and deliver certificates showing, either on the face of them or from the indorsements, that the title is in the person conveying).

dorsement of an agent's signature upon a certificate of stock issued to the principal, without stating the name of the principal on whose behalf it was signed, cannot, it has been held, authorize the corporation to cancel the principal's certificate.¹⁸ A sale of stock is usually attended by immediate delivery of the certificate. When the contract is complete the law implies that it will be performed by delivery of the certificate immediately or within a reasonable time. But the delivery is not necessarily of the essence of the transfer,—¹⁹ the passing of title being determined rather by the intention of the parties as gathered from the terms of the contract.²⁰ Where the certificate is not held by the vendor, of course no symbolical delivery is possible,¹ but in such case delivery is not necessary.²

§ 197. Necessity for Delivery and Continued Possession.—Where a transfer is accomplished by indorsement and delivery of the stock certificates by way of pledge, the transfer is subject to the rules which govern in the case of other personal property. To avail against creditors, the transfer must be accompanied by delivery and continued change of possession. Thus, a transaction by which the pledgee received momentary possession of certificates and returned them at once to the pledgor constitutes no valid transfer as against creditors of the pledgor.³ A temporary redelivery of the certificates, however, will not break the continuity of possession so as to invalidate a transfer under section 3440 of the Civil Code which re-

18. *Taft v. Presidio etc. R. Co.*, 84 Cal. 131, 18 Am. St. Rep. 166,

11 L. R. A. 125, 24 Pac. 436.

19. *Mason v. Lievre*, 145 Cal. 514, 78 Pac. 1040.

20. *Mason v. Lievre*, 145 Cal. 514, 78 Pac. 1040; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55; *Majors v.*

Girdner, 31 Cal. App. 47, 159 Pac. 826.

1. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

2. See *infra*, § 198.

3. *McFall v. Buckeye etc. Warehouse Assn.*, 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

quires continued change of possession.⁴ But the provisions of section 3440 as to the necessity for the immediate delivery and continued change of possession of personal property as against creditors of the vendor are not applicable to a transfer where the certificate is not transferred, but transfer is made in a mode other than by its indorsement and delivery.⁵ At any rate, section 3440 does not render void a transfer as between the parties where there is no change of possession.⁶

§ 198. Other Methods of Transfer.—The language of section 324 of the Civil Code that shares of stock may be transferred by indorsement and delivery of the certificate merely prescribes a mode by which the transfer may be made. It does not prohibit a transfer by other methods nor declare that when made in another manner a transfer may not be enforced by the party entitled to the shares.⁷ In other words, the section clearly does not cover the whole subject of transfer of stock.⁸ Thus, the section does not forbid the making of a contract, good as between the parties, that a certificate shall pass with the transfer of certain other property.⁹ Where certificates are not issued, the interest of the owner of the stock may never-

4. *Stowe v. Harvey*, 241 U. S. 199, 60 L. Ed. 953, 36 Sup. Ct. Rep. 541, see, also *Rose's U. S. Notes* (citing *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676, as expressing the settled rule in California under the statute against fraudulent conveyances).

5. *Bacon v. Traders' Oil Corp.*, 34 Cal. App. Dec. 928, 201 Pac. 477. It is obvious that there can be no manual delivery of the shares themselves, the certificates being mere evidence of the shares. See *supra*, § 137.

6. *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658. See **FRAUDULENT CONVEYANCES**.

7. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54; *Bacon v. Traders' Oil Corp.*, 34 Cal. App. Dec. 928, 201 Pac. 477; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

8. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

9. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54.

theless be transferred as a right in property.¹⁰ And even where certificates have been issued, transfer may be made without an assignment or delivery thereof in any manner appropriate to the assignment of choses in action or intangible personal property, as, for example, by bill of sale.¹¹

Right to Transfer or Entry on the Books.

§ 199. **In General.**—While a certificate of stock is evidence of the property, it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder.¹² And where there has been a valid transfer, the transferee has a right to have the stock transferred on the books of the corporation.¹³ And one who has purchased of the owners stock in an insolvent corporation, and thereby has become entitled to whatever rights accompany such ownership, is entitled to be registered in the stock book as the owner of the stock so transferred to him and as a stockholder in the concern.¹⁴ But the purchaser after dissolution of the corporation cannot become a record holder of the stock.¹⁵ Thus, where a corporation has, by reason of failure to pay the license tax, forfeited its charter or its franchise to do

10. *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 1000; *Boob v. Hall*, 107 Cal. 160, 40 Pac. 117 (where stock in water company for which no certificates had been issued were held to pass under instrument including shares of such stock); *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

11. *Bacon v. Traders' Oil Corp.*, 34 Cal. App. Dec. 923, 201 Pac. 477; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

12. *Payne v. Elliott*, 54 Cal. 339, 35 Am. Rep. 80.

13. *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359. And see cases cited *infra*, § 200 et seq.

14. *People v. California etc. Trust Co.*, 18 Cal. App. 732, 124 Pac. 558 (holding that if there are no officers for the corporation to act in making the registry, the court may require it to be done by a receiver of the corporation).

15. *Aalwyn's Law Inst. v. Martin*, 173 Cal. 21, 159 Pac. 158.

business in the state, the directors of such corporation cannot be compelled to reissue stock to one who purchases subsequent to the forfeiture.¹⁶ The corporation and its directors having no authority to transact any corporate business or to exercise any corporate power whatever after such forfeiture cannot be compelled to make a requested reissue of stock. In view of the provision contained in section 14 of article XII of the constitution, the federal court has held that stock of a foreign corporation doing business in California is required to be transferred in this state.¹⁷

§ 200. Demand and Refusal to Transfer in General.—

When the formalities prescribed by law for the assignment and transfer of stock have been complied with and the performance of the officer's duty to make the transfer on the books of the company has not been delayed by notice and claim of adverse interest from any person, nor prevented by legal proceedings, the transfer cannot be refused merely because of information and belief that the stock in question is owned by a third person.¹⁸ An objection that the assignment was technically defective cannot avail where it is admitted by the pleadings and established by the proof that the secretary placed his refusal to perform the duty demanded of him solely on the ground that the person making the demand was not the real

16. *Lewis v. Miller & Lux*, 156 Cal. 101, 103 Pac. 496 (domestic corporation); *Carpenter v. Bradford*, 23 Cal. App. 560, 138 Pac. 946 (foreign corporation).

17. *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663.

18. *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

Evidence is admissible by the corporation to show any circum-

stances that would justify or excuse the refusal to transfer the stock on demand of the plaintiff; *Young v. New Standard etc. Co.*, 148 Cal. 306, 83 Pac. 28. See *Bowring v. Prime*, 31 Cal. App. Dec. 767, 189 Pac. 701, holding that the fact that at the time of demand the revenue stamps required by law were not affixed to the certificate or tendered is of no importance as interfering with the right of recovery.

owner. So, also, an objection that the demand was uncertain and indefinite in that it failed to designate the particular stock sought to be transferred will not avail where it is admitted that the certificate representing the stock in controversy was presented to the secretary and a request made for transfer thereof on the books.¹⁹ The right of the corporation to make a transfer is derived from the transferor,²⁰ and hence his declarations tending to impeach his right or title are competent evidence against the corporation. Evidence that the transferor was without right would defeat the claim that the action of the corporation was lawful.¹ That will be considered done which ought to have been done, so between those refusing a demand for transfer, on the one hand, and the owners of stock whose demand for its transfer has been refused on the other, the case will be treated as if the latter were stockholders of record where the fact that they are not is due solely to wrongful refusal of an officer of the corporation to make them such.²

§ 201. Demanding Evidence of Authority to Transfer.

Under the rule that the right of the corporation to make a transfer is derived from the transferor,³ the corporation may rightfully demand evidence of authority to make

19. Spangenberg v. Nesbitt, 22 Cal. App. 274, 134 Pac. 343.

20. Cooper v. Spring Valley Water Co., 171 Cal. 158, 153 Pac. 936. (The opinion on the first hearing in the supreme court stated that in legal effect title passed from the transferor to the corporation for the purposes of transfer and from the corporation to the transferee; but on rehearing the court held that actual passage of title to the certificate to the corporation as a medium of transfer was not essential to the argument, that the statement to the contrary

effect was obiter dictum, although it was not said to be erroneous); Taft v. Presidio etc. R. Co., 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436.

1. Cooper v. Spring Valley Water Co., 171 Cal. 158, 153 Pac. 936.

2. Guaranty Loan Co. v. Fontanel, 183 Cal. 1, 190 Pac. 177 (where presence of such owners was necessary to complete a unanimous consent to meeting of stockholders); Guaranty Loan Co. v. Treadwell, 35 Cal. App. Dec. 643, 200 Pac. 653.

3. See supra, § 200.

transfer before permitting it to be entered.⁴ Hence, where the certificate is presented by a person other than the one therein named, as either owner or transferee, it is the duty of the corporation to refuse to make the transfer on the books.⁵ Generally speaking, sufficient evidence of right is found in the possession of legal title to the stock; yet it is settled that this is not in all cases sufficient. The true equitable ownership may be in some other than the holder of the legal right and the transfer may be a gross wrong to such equitable owner.⁶ Thus, where a corporation has notice that a stockholder holds his stock as trustee for another, it is bound to refuse to register the trustee's transfer until it is satisfied the trustee has power to make it. If the corporation allows the transfer and the trustee has no power to make it, the corporation is liable to the cestui que trust.⁷ However, the mere use of the word "trustee" is not sufficient of itself to give notice of a trust.⁸

§ 202. Delay in Making Transfer.—The officers of a corporation may ordinarily refuse for the time being a requested registry of stock when notified to do so by a third person who claims some interest in the stock which might be lost or injuriously affected by the transfer, and in the presence of such conflicting claims it is the privilege and duty of the officers, if there be a reasonable doubt as to the respective rights of the contending claimants, to refuse—or rather delay—registry to either party until the lapse of a reasonable time, within which the merits of the

4. *Taft v. Presidio etc. R. Co.*, 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436. in accordance with the provisions of law and its by-laws).

5. *Nicholls v. Reid*, 109 Cal. 630, 42 Pac. 298; *Taft v. Presidio etc. R. Co.*, 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436 (holding that the owner has the right to assume that the corporation will make the transfer only

6. *Taft v. Presidio etc. R. Co.*, 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436.

7. *Young v. New Standard etc. Co.*, 148 Cal. 306, 83 Pac. 28.

8. See *infra*, § 211. And see *Trusts*.

controversy may be determined.* And it has been said that a case might also be presented where a delay of five or ten days from the time of demand for the issuance of a new certificate would not be unreasonable, as, for instance, where a large corporation has an active market on its shares, and where a great many transfers are being demanded and required. In such a case there might well be a showing of reasonable promptness in complying with the demand, where the secretary attends to the making of transfers in the order of the requests therefor.¹⁰

§ 203. Adverse Claims as Ground for Refusing Transfer.—Whenever a corporation is charged with notice of adverse claims to stock, it is put to its election whether it will treat one demanding transfer as the owner and make a transfer accordingly, or whether it will heed the notice of the claimant and hold the stock for him.¹¹ Under such circumstances the corporation occupies the position of an agent or trustee of both and is bound to the exercise of good faith,¹² since its action in transferring the stock will operate to clothe the transferee with the apparent legal title to the stock.¹³ Upon the commencement of an action by a claimant, the corporation is bound at its peril to preserve the property in statu quo, so far as is necessary to protect the rights claimed by the plaintiff, and to keep the stock subject to the power of the court; and it is not authorized to transfer the shares on its books or in any manner hinder or delay the plaintiff, unless by his consent or under permission of the court. And a transferee with notice stands

9. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

10. *Bowring v. Prime*, 31 Cal. App. Dec. 767, 189 Pac. 701.

11. *Cooper v. Spring Valley Water Co.*, 171 Cal. 158, 153 Pac. 936.

12. *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616; *Cooper v. Spring Valley Water Co.*, 171 Cal. 158, 153 Pac. 936.

13. *Cooper v. Spring Valley Water Co.*, 171 Cal. 158, 153 Pac. 936.

in like position.¹⁴ Upon receipt of notice that stock belongs to another, a corporation may lawfully refuse to transfer it and may commence an action to compel adverse claimants to interplead and litigate their claims, and may relieve itself of responsibility by depositing the stock in court.¹⁵ When the court has determined ownership, the corporation may recognize the person declared to be owner without incurring any liability to other claimants.¹⁶ The corporation is not obligated to pursue this course, however, and has the right to decide by independent investigation as to where the rights of the parties lay,¹⁷ although, in such case, it takes the risk of having to pay the true owner the value of the stock if it turns out that the person recognized is not entitled to the stock.¹⁸

§ 204. Existence of Liens as Ground for Refusal.—Officers of a corporation cannot refuse to transfer certificates of stock to a holder thereof demanding such transfer simply because a writ of attachment has been levied on the shares of the original holder, the lien of which attachment has not been released but is still subsisting at the time of the demand,¹⁹ and the secretary is presumed to know that this is the law.²⁰ The reason is that a lien on shares is not affected by the transfer thereof, since the shares remain the same after the transfer of the certificates and

14. *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616.

15. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 17, 116 Pac. 298. See INTERPLEADER.

16. *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 17, 116 Pac. 298.

17. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343 (stating the circumstances under which it becomes the duty

of the corporation or its officers to register the disputed stock in the name of the first claimant); *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 17, 116 Pac. 298.

18. *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 17, 116 Pac. 298.

19. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Bowring v. Prime*, 31 Cal. App. Dec. 767, 189 Pac. 701.

20. *Bowring v. Prime*, 31 Cal. App. Dec. 767, 189 Pac. 701.

remain subject to the lien which attached prior to the transfer.¹

§ 205. Equitable Action to Compel Transfer.—The true owner of stock may resort to a court of equity to compel the corporation to register on its books a transfer and issue to him a new certificate, for it is the owner's right to have the corporate books show truthfully the real title of each person having any lawful interest in the stock.² This it is said is the best remedy, and, being practically a suit for specific performance of the obligation to transfer the stock, would, in general, be more satisfactory than a remedy by way of mandamus,³ since every claimant can be made a party to the action and a complete adjustment can be made of the rights and interests of all concerned.⁴ As a consequence the remedy has been often resorted to.⁵ Such an action being for equitable relief, however regarded,⁶ the defendant is not entitled to a jury trial.⁷

1. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *Craig v. Hesperia etc. Water Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10. See *infra*, § 229, as to attachment of unregistered stock.

2. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

3. *Spangenberg v. Western Heavy etc. Iron Co.*, 166 Cal. 284, 135 Pac. 1127. As to the rule that mandamus will not lie, see *infra*, § 207.

4. *Spangenberg v. Western Heavy etc. Iron Co.*, 166 Cal. 284, 135 Pac. 1127; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

5. *Spangenberg v. Western Heavy etc. Iron Co.*, 166 Cal. 284, 135 Pac. 1127; *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A.

(N. S.) 987, 108 Pac. 676; *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143 (holding that in such action the holder wrongfully divested of his rights is not only entitled to a transfer on the books but to any dividends which may have accrued); *Hinrichsen v. Imperial Water Co.*, 33 Cal. App. Dec. 213, 193 Pac. 608; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55; *Kleinecke v. North Confidence etc. Dev. Co.*, 41 Cal. App. 109, 182 Pac. 313; *Cahlan v. Bank of Lassen County*, 11 Cal. App. 533, 105 Pac. 765.

6. *Ashton v. Heggerty*, 130 Cal. 516, 62 Pac. 934.

7. *Noble v. Learned*, 153 Cal. 245, 94 Pac. 1047; *Ashton v. Heggerty*, 130 Cal. 516, 62 Pac. 934.

The mere fact of plaintiff's ownership is sufficient to give him the cause of action against the corporation; and this is the case where stock has been assigned, the same principle being applicable where one acquires the equitable title to stock standing in the name of another.⁸

There is a marked distinction in such actions between proper and necessary parties defendant. Thus, where the action is brought by a purchaser at a mortgage foreclosure to compel the transfer, the mortgagor is not a necessary party.⁹ But for the purpose of such relief the record holder or claimant is a proper, if not a necessary, party defendant,¹⁰ and where it would seem that the presence of one who claims a special property in the shares is necessary to a complete determination of the controversy, the court sua sponte should make an order, under section 389 of the Code of Civil Procedure, directing him to be brought into the action as a defendant.¹¹

§ 206. Refusal to Transfer as Conversion.—Although it may be a fiction to ascribe the term "conversion" to a refusal of the corporation to transfer shares, there is, it has been said, no difficulty in applying the remedy which was afforded by the common-law action of trover to a case where the owner of shares has been wrongfully deprived thereof, even though his possession of the certificate has not been disturbed.¹² Therefore, where the corporation

8. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143 (action by pledgee to retain his security unimpaired by wrongful transfer); *Ashton v. Hegerty*, 130 Cal. 516, 62 Pac. 934.

9. *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658.

10. *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458 (the corporation is properly made a defendant with the party whom it is alleged ac-

quired stock from plaintiff by fraud); *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

11. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

12. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476 (see, however, the concurring opinion of McFarland, J., in which he says that if the question were an open one, he would hold that

refuses to allow a transfer on its books, the person entitled may treat this as a conversion of his shares and sue the corporation for their value,¹³ if he has legal title to the stock.¹⁴ Likewise it is a conversion where the corporation, without authority, transfers stock to a person other than the owner.¹⁵ A suit in equity where registration of the transfer may be compelled or damages recovered as an alternative may be preferable, but it is not exclusive of the remedy by suit for damages for conversion.¹⁶ To sustain an action for conversion, however, damage must be alleged as the consequence of the refusal to transfer, and it must appear that the certificates issued were indorsed and delivered to the plaintiff and were presented to the corporation as evidence of his right to have entries made in the books, and that demand was made for new certificates.¹⁷ Cases may arise where no conversion by the corporation should affect the status of a stockholder in his relation to the creditors of the corporation.¹⁸ Thus, a corporation after insolvency cannot, by converting the stock of its shareholders, relieve them of liability upon their stock,

the refusal of a corporation to make a transfer on its books is not a conversion of such stock by the corporation). And see cases cited *infra*.

13. *Cooper v. Spring Valley Water Co.*, 171 Cal. 158, 153 Pac. 936; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852; *Fromm v. Sierra etc. Min. Co.*, 61 Cal. 629; *Kimball v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157; *Ellsworth v. National Home etc. Builders*, 33 Cal. App. 1, 164 Pac. 14; *London etc.*

Bank v. Aronstein, 117 Fed. 601, 54 C. C. A. 663. See, also, *Craig-San Bernardino Invest. Co.*, 101 Cal. 122, 35 Pac. 558, where on motion to vacate default the showing of merits was that the corporation had never refused to transfer the stock.

14. *Morrison v. Gold Mt. etc. Min. Co.*, 52 Cal. 306.

15. See *infra*, § 209.

16. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476. See *supra*, § 205.

17. *Edwards v. Sonoma Valley Bank*, 59 Cal. 136. See *supra*, § 146, as to market value as basis of damages.

18. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476.

and it matters not what may be the motive which induces the act of conversion.¹⁹

§ 207. Mandamus to Compel Transfer.—It is a general rule in California that mandamus will not lie to compel a transfer of stock. The reason for this rule is that there exists an adequate remedy in the ordinary course of law by action to compel the entry of the transfer on the books.²⁰ It has been remarked that possibly there may be cases in which mandamus would issue because of the fact that the remedy by suit, while adequate, would not be speedy, but in the absence of facts tending to show such a condition, mandamus will not lie.¹ While it seems to have been assumed in an early decision that the remedy by an action for damages for a conversion would be, in all cases, an adequate substitute for the writ of mandamus,² later the court has remarked that if the remedy by action for damages for conversion were the only remedy available to a transferee, it would not always be adequate, for "it is obvious that in many cases it would not afford the precise relief which in justice and equity the transferee should have." Unless some extraordinary emergency exists, the suit in equity is said to be the most appropriate, and it is doubtful whether a proceeding in mandamus would be any more expeditious than a suit in equity or an action for damages, since appeal will lie from

19. *National Carriage Mfg. Co. v. Story etc. Commercial Co.*, 111 Cal. 531, 44 Pac. 157. See *infra*, § 330.

20. *Spangenberg v. Western Heavy etc. Iron Co.*, 166 Cal. 284, 135 Pac. 1127 (stating the various remedies available); *Kimball v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157. But see *People v. Crockett*, 9 Cal. 112, *contra*, where mandamus was allowed, but where the point was not raised. And see,

also, *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143, where it is said that the corporation may be compelled by mandamus to open its books and allow registry, but where the equitable suit to compel transfer is apparently meant.

1. *Spangenberg v. Western Heavy etc. Iron Co.*, 166 Cal. 284, 135 Pac. 1127.

2. *Kimball v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157.

one as well as from the other, and the same delays are available to the defendant as in ordinary actions.³

§ 208. Statutory Penalty for Refusal.—Whenever any officer of a corporation refuses to make entries on its books or to transfer stock therein or to issue a certificate therefor to the transferee as provided by law, such officer is subject to a penalty of four hundred dollars, to be recovered as liquidated damages in an action brought against him by the person aggrieved.⁴ Although conflicting claims may present a case for refusal to transfer upon demand of one of the parties, nevertheless, where no notice of adverse claim is given, an officer cannot refuse the transfer merely upon his own information and belief that the stock is owned by another without incurring the statutory penalty.⁵ And even where notice of an adverse claim is made, in order to avoid the penalty imposed, the officer must proceed to have the question of superior right to transfer determined.⁶ In an action to recover the penalty, it is not necessary, as part of the statement of the cause of action, to allege that the defendant has willfully and without lawful reason refused to make the transfer. A complaint which, in the language of the statute, alleges the refusal to comply with a request for the performance of the statutory duty *prima facie* states a cause of action.

3. *Spangenberg v. Western Heavy etc. Iron Co.*, 166 Cal. 284, 135 Pac. 1127. See *MANDAMUS*. And see *supra*, § 205, as to equitable action to compel transfer.

4. Civ. Code, § 324; *Bowring v. Prime*, 31 Cal. App. Dec. 767, 189 Pac. 701. See *supra*, § 194, as to liability of officer for refusing to enter transfer of shares by non-resident owner. As to liquidated damages generally, see *DAMAGES*.

5. *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

6. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670 (holding that a finding that defendant refused to issue any certificate should be taken to mean not merely that he refused to issue a general unrestricted form of certificate but that he refused to recognize the right of plaintiff to have a certificate in any form issued to him).

The reasons for the refusal, if any, are properly pleaded as a matter of defense.⁷

§ 209. Irregular or Unauthorized Transfer on Books.—Since the purchaser of stock is protected in the enjoyment of his purchase, even though there is no right to make the transfer to him, an unauthorized transfer is a wrong done to the owner for which not only the person who makes it but anyone knowingly assisting in the wrong is responsible.⁸ And so, a corporation cannot permit a transfer until the requirements of its by-laws and the laws of the state are fully complied with, without responsibility to the owner,⁹ unless there has been a waiver of right on the owner's part.¹⁰ Before canceling a certificate and issuing a new one, it is the duty of the corporation to know whether there is authority in the person demanding the transfer to make it.¹¹ For a violation of this duty the corporation is liable for damages in conversion.¹²

Apparent Ownership or Power of Disposition.

§ 210. In General.—The holder of a certificate for stock is in possession of the shares for which it is issued.¹³ But possession of the certificate is not, of itself, evidence of

7. Spangenberg v. Nesbitt, 22 Cal. App. 274, 134 Pac. 343. See PENALTIES.

8. Taft v. Presidio etc. R. Co., 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436.

9. Taft v. Presidio etc. R. Co., 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436.

10. People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858. See supra, § 125.

11. Quay v. Presidio etc. R. Co., 82 Cal. 1, 22 Pac. 925.

12. Cooper v. Spring Valley Water Works, 145 Cal. 207, 78 Pac. 654; Taft v. Presidio etc. R. Co., 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436; Quay v. Presidio etc. R. Co., 82 Cal. 1, 22 Pac. 925. See supra, § 206, as to liability for conversion upon refusal to transfer; and supra, § 146, as to measure of damages.

13. Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359.

the right of the party producing it to convey the shares,¹⁴ unless he is exercising acts of ownership over it, in which event the presumption is that he is the owner.¹⁵ When a certificate has been indorsed in blank, the possession of the certificate gives the holder thereof all the indicia of absolute ownership of the stock,¹⁶ even though he is but a mere bailee,¹⁷ pledgee,¹⁸ or trustee.¹⁹ The delivery of the indorsed certificate must, of course, be voluntary.²⁰ Where it is stolen a very different rule applies.¹

If the owner desires to prevent abuse of a secret trust, he should see that the nature thereof is disclosed on the face of the certificate, or by some other method, place it beyond the trustee's power to deal with the stock as his own.² The fact that shares stand on the books in the name of one other than the holder of the certificate, where it is indorsed in blank, is not sufficient to put one on notice

14. *Nicholls v. Reid*, 109 Cal. 630, 42 Pac. 298; *Brewster v. Sime*, 42 Cal. 139.

15. *Bumiller v. Bumiller*, 179 Cal. 119, 175 Pac. 897 (holding that where the presumption of ownership arises from exercise of acts of ownership, it is immaterial whether the name of the record holder is indorsed in blank on the stock, the important finding being that he is owner of the stock).

16. *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271; *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, 77 Pac. 405; *Thompson v. Toland*, 48 Cal. 99; *Brewster v. Sime*, 42 Cal. 139.

17. *Krouse v. Woodward*, 5 Cal. Unrep. 230, 42 Pac. 1085; *S. C.*, 110 Cal. 638, 42 Pac. 1084; *Ambrose v. Evans*, 66 Cal. 74, 4 Pac. 960.

18. *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271.

19. *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077 (trustee holding stock in his own name); *Thompson v. Toland*, 48 Cal. 99 (the owner and not an innocent purchaser or pledgee must bear the loss resulting from the breach of a trust where the owner knowingly allows an indorsed certificate to remain in the hands of the trustee).

20. *Arnold v. Johnson*, 66 Cal. 402, 5 Pac. 796.

1. *The Yamato v. Bank of Southern California*, 170 Cal. 351, 149 Pac. 826 (where secretary of corporation stole certificate pledged to it); *Kohn v. Sacramento etc. R. Co.*, 168 Cal. 1, 141 Pac. 626 (drawing distinction between inability of thief to impart title and passage of title by apparent owner). See *supra*, § 190, as to title of finder or thief.

2. *Thompson v. Toland*, 48 Cal. 99.

that the holder of the certificate is not the owner of the stock.³ And knowledge that a pledgor is a stock broker does not, as a matter of law, put one upon inquiry as to his powers with relation to the stock pledged.⁴

§ 211. **Use of Word "Trustees."**—Whatever may be the law in other jurisdictions, it has long been settled in California, and has now become a rule of property, that the mere addition of the word "trustee" to the name of the holder of shares does not in and of itself impart to anyone dealing with such holder notice that he is not the owner of the stock,⁵ or at least that he has not authority to sell or hypothecate it,⁶ or has not full right to deal with it as his own;⁷ neither does the presence of such term limit in any way the absolute power of disposition,⁸ or give constructive notice of the equities of the secret owner,⁹ or impart notice that any other person has an interest in the stock.¹⁰ This general rule is based on considerations of public policy and common justice, for if it is intended that the so-called trustee shall not have power to sell or hypothecate the stock without the consent of the equitable

3. *Krouse v. Woodward*, 5 Cal. Unrep. 230, 42 Pac. 1085, same case, 110 Cal. 638, 42 Pac. 1084; *Hellman etc. Savings Bank v. Armstrong*, 39 Cal. App. 483, 179 Pac. 432.

4. *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271.

5. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 163 Pac. 47; *Fletcher v. Kidder*, 163 Cal. 769, 127 Pac. 73; *Thompson v. Toland*, 48 Cal. 99; *Brewster v. Sime*, 42 Cal. 139; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

6. *Northwestern Portland Cement*

Co. v. Atlantic Portland Cement Co., 174 Cal. 308, 163 Pac. 47; *Brewster v. Sime*, 42 Cal. 139.

7. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

8. *Brewster v. Sime*, 42 Cal. 139.

9. *Fletcher v. Kidder*, 163 Cal. 769, 127 Pac. 73; *Brewster v. Sime*, 42 Cal. 139.

10. *Thompson v. Toland*, 48 Cal. 99; *Brewster v. Sime*, 42 Cal. 139 (addition of word "trustee" does not operate as constructive notice of any secret equities as against persons who in good faith purchase or advance money on the stock without notice).

owner, it is an easy matter to limit his authority by apt words in the certificate.¹¹

§ 212. Title Passed by Apparent Owner.—Purchasers or pledges from an apparent owner of stock will be protected in their rights as against the real owner of the stock.¹² Thus, where a broker receives an indorsed certificate for the purpose of making a sale, but instead pledges the stock, the pledgee who parts with title on the presumption that the broker is the owner secures a valid claim against the stock.¹³ The real owner cannot claim as against a bona fide purchaser that the apparent owner has a limited title, when knowledge of the limitation has not been conveyed to the purchaser.¹⁴ In such instances the rights of the innocent third party do not depend upon the actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner,¹⁵ which estops him from claiming title against the purchaser in good faith who relies on the apparent ownership.¹⁶ But where one is not a holder in good faith and for value as against the owner, he cannot rely upon the apparent ownership. Thus a pledgee cannot, after the secured obligation is discharged, hold the stock for another debt. As to such other debt, he is not, in the absence of an agreement to the contrary, a holder in good faith and for value as against the real owner.¹⁷ The

11. *Brewster v. Sime*, 42 Cal. 139.

12. *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, 77 Pac. 405; *Ambrose v. Evans*, 66 Cal. 74, 4 Pac. 960; *Thompson v. Toland*, 48 Cal. 99; *Brewster v. Sime*, 42 Cal. 139. See *Winter v. Belmont Min. Co.*, 53 Cal. 428 (which apparently rests on this principle).

13. *Mortgage v. National Bank of California*, 24 Cal. App. 103, 140 Pac. 300.

14. *Spellacy v. Young*, 30 Cal. App. Dec. 446, 186 Pac. 368.

15. *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, 77 Pac. 405.

16. *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616; *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271; *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, 77 Pac. 405; *Brewster v. Sime*, 42 Cal. 139.

17. *Niles v. Edwards*, 90 Cal. 10, 27 Pac. 159. See PLEDGE.

proposition that possession of an indorsed certificate is prima facie evidence of ownership and that a holder for value without notice of prior equities obtains a perfect title against such equities is not, it has been said, weakened, but rather is strengthened, by the provisions of section 324 of the Civil Code.¹⁸

Levy of Attachment or Execution.

§ 213. **Attachment of Shares in General.**—The rights or shares which a person may have in the stock of a corporation, together with the interest and profit thereon, are made subject to the levy of a writ of attachment.¹⁹ It has been doubted, however, whether the levy of an attachment constitutes in any sense a transfer of the shares or of any interest therein, within the meaning of section 324 of the Civil Code, so that when a new certificate is issued to a purchaser of the shares which have been attached it should be issued subject to a notation that the shares have been attached.²⁰ The attachment is a mere lien on the shares, not upon the certificate, and the levy does not deprive the owner of his title and he may exercise all rights of ownership subject to the lien of the attachment.¹ An attachment being merely a creature of the law, and its existence and operation in no case continuing longer than the statute provides, after dissolution by judgment in favor of the defendant, the owner of the stock may transfer it with like effect as before the attachment, and this notwithstanding an appeal from the judgment.² The corporation itself may levy an attachment against the stock-

18. *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359.

19. *Code Civ. Proc.*, § 541. See *LEVY AND SEIZURE*.

20. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670 (not deciding whether corporation would be justified in refusing to issue to trans-

feree of a stockholder whose shares had been attached any certificate except one showing the fact of attachment).

1. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670.

2. *Loveland v. Alvord etc. Min. Co.*, 76 Cal. 562, 18 Pac. 682.

holder on his stock in an action for unpaid subscriptions where no lien exists on the stock by contract between the parties.³ For purposes of attachment and execution, the situs of shares of stock is within the state where the corporation resides, which is ordinarily the state where it is incorporated, and they may be lawfully levied on in that state though owned by a nonresident.⁴

§ 214. Mode of Attaching Shares.—The mode of attachment of shares of stock is prescribed by subdivision 4 of section 542 of the Code of Civil Procedure, namely, by leaving with the president or other head of the corporation, or the secretary, cashier or other managing agent thereof, a copy of the writ and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ.⁵ Specific provision being thus made, the general language of subdivision 5 of section 542, as to the mode of attaching personal property not capable of manual delivery, must be restricted to forms of property other than corporate shares.⁶ Likewise, the provision making persons having in their possession or under their control personal property belonging to the defendant liable to the plaintiff unless the property is delivered up or transferred to the sheriff,⁷ is complementary to subdivision 5 of section 542, relating to other personal property incapable of manual delivery, and has no application to the attachments of shares under subdivision 4.⁸ The only proper mode of attaching the interest of an equitable owner, however, is by garnishing the record holder of the

3. *Lankershim Ranch etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134. 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676. See LEVY AND SEIZURE.

4. *Wait v. Kern River etc. Co.*, 157 Cal. 16, 106 Pac. 98. See LEVY AND SEIZURE.

5. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670; *National Bank of Pacific v. Western Pac. Ry. Co.*,

6. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670.

7. Code Civ. Proc., § 544.

8. *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670.

stock. The corporation, after transfer on its books, is no longer privy to the interest of the transferor, even though the transferee is but a mortgagee of the stock.⁹

§ 215. Levy of Execution on Shares.—Shares and interests in any corporation or company may be levied upon or released from levy of execution in like manner as such property may be attached or released from attachment.¹⁰ Where shares have been seized under attachment it has been said that there is probably no need of a levy of execution beyond giving notice of sale as a necessary step in the proceeding; at least the title of a purchaser of the stock is not affected by the failure of the officer to show in his return that he levied before selling.¹¹ It is not necessary to the sale of the interest in the shares that they should be in the hands of the sheriff to be personally delivered to the purchaser. The code provisions appear to treat the interest of the debtor in shares as personal property not capable of manual delivery. When the execution is served, the sale proceeds without manual possession for the levy, as in the case of property capable of manual delivery.¹²

When corporate stock is sold on execution, the sheriff must give the purchaser a certificate of the sale, which conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.¹³ It is not necessary that the sheriff

9. *Edwards v. Beugnot*, 7 Cal. 162. Cf. *Smitton v. McCullough*, 182 Cal. 530, 189 Pac. 686, to the effect that the holder of shares, not the corporation, is the holder of the fund which an assignment of equitable interests in the stock operates, hence notice to the corporation would be of no effect.

10. Code Civ. Proc., § 688; *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171,

65 Pac. 622 (holding that the writ of execution is served as is the writ of attachment). See *LEVY AND SEIZURE*.

11. *McFall v. Buckeye etc. Warehouse Assn.*, 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

12. *West Coast etc. Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622. See *EXECUTIONS*.

13. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573,

should deliver to the purchaser the certificate however. The levy and sale entitle him to have a certificate issued to him, and for that purpose the court would, upon appropriate proceedings, compel surrender of the original certificate for reissue to the purchaser.¹⁴ Under an execution against the corporation, of course, shares belonging to the stockholders cannot be levied on. Thus, where stock is purchased by a corporation at an assessment sale, it is held subject to the control of the stockholders and the corporation has no interest therein which can be sold or disposed of.¹⁵

Stock Made Appurtenant to Land.

§ 216. In General.—Section 324 of the Civil Code in part provides that

“Any corporation organized for, or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes or for domestic use, may in its by-laws provide that water shall only be sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto.”

But because section 324 is not complied with, it does not follow that the shares may not be appurtenant to the land.¹⁶ Aside from such provision, an agreement between

21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; Code Civ. Proc., § 699.

14. West Coast etc. Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

15. Robinson v. Spaulding etc. Min. Co., 72 Cal. 32, 13 Pac. 65.

16. Estate of Thomas, 147 Cal. 236, 81 Pac. 539 (holding that stock certificate which was mere evidence of a water right, which though capable of severance from the land to which it was appurtenant, yet never was in fact severed, passed with the right of which it

a stockholder and the company that the stock shall be transferable only with the land, and conversely, that a transfer of the land shall pass to the grantee the right to the stock, that is, the equitable title thereto, is valid, and a transfer of the land in such case will carry with it the equitable title to the stock. Such an agreement is a contract by the owner for the benefit of the grantee of the land who may enforce the contract made for his benefit.¹⁷ Since a thing is deemed to be appurtenant to land when it is by right used with the land for its benefit, whether or not a water right is made appurtenant to land by describing the land in the certificate of stock and complying with the provisions of section 324 of the Civil Code or otherwise, is immaterial.¹⁸

§ 217. Transfer of Title to Stock With Land.—Stock of a water company is not presumptively appurtenant to land; and so it has been held that a mortgage of lands and also of a ditch “which conveys water to said lands . . . with all the water rights and privileges appurtenant to said ditch or by means of which said ditch is supplied with water” cannot be presumed to include shares of stock owned by the mortgagor in a water company, in the absence of evidence that the water company owned the ditch or the water flowing therein, or the means by which the ditch was supplied with water.¹⁹ But where the water right is appurtenant to the land, the purchaser at a mortgage foreclosure sale of the land acquires ownership of the stock, notwithstanding no mention of the stock is

was evidence); *Woodstone Marble etc. Co. v. Dunsmore Canyon Water Co.*, 31 Cal. App. Dec. 1045, 190 Pac. 213.

17. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54. See *Security etc. Sav. Co. v. Imperial Water Co.*, 183 Cal. 488, 192 Pac. 22, which states that possibly the same results would follow from the

by-laws and certificates, even if a copy of the by-laws were not recorded. As to contracts made for the benefit of third persons, see *CONTRACTS*, ante, p. 469 et seq. And see *COVENANTS*.

18. *Swan v. Walden*, 19 Cal. App. 128, 124 Pac. 857. See *WATERS*.

19. *Bank of Visalia v. Smith*, 146 Cal. 398, 81 Pac. 542. See *WATERS*.

made in the mortgage; and under such circumstances a judgment in an action by the purchaser for an adjudication of his ownership of the stock and issuance of certificate, it will be assumed on appeal, in support of the judgment, that the provisions of section 324 of the Civil Code as to recording of by-laws that the stock should be deemed appurtenant to the land had been complied with.²⁰ Where the findings indicate the probability that the corporation had provided in its by-laws that the water should only be sold or distributed to owners of its capital stock and that it should be appurtenant to the lands described in the certificate issued therefor, and that a certified copy of the by-laws had been recorded as provided for in section 324 of the Civil Code, then the shares of stock can be transferred only with the lands and pass as an appurtenance thereto, and not otherwise; and in such case, the purchaser of the stock without the land would obtain no title to the stock.¹

Under the general law, however, a purchaser of shares is entitled to receive certificates and to come into the corporation as a shareholder on the same footing as others; consequently, where one purchases water company stock with a special indorsement on the certificate requiring it to be transferred only with certain land, and new certificates are issued to him without the special indorsement, he is put upon the same footing with other stockholders, although he must, of course, own or acquire land within the district, and may have his shares ascribed to such land by indorsement on the certificate.² If stock is declared by a mortgage to be appurtenant to the land, it passes therewith and may be sold with the land upon foreclosure, and is not to be treated as a mortgage upon personal property, invalid except as between the parties.³ A

20. Woodstone Marble etc. Co. v. Dunsmore Canyon Water Co., 31 Cal. App. Dec. 1045, 190 Pac. 213.

1. Security etc. Sav. Co. v. Imperial Water Co., 183 Cal. 488, 192 Pac. 22.

2. Spurgeon v. Santa Ana etc. Irr. Co., 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140.

3. San Gabriel Valley Bank v. Lake View etc. Co., 4 Cal. App. 630, 89 Pac. 360.

conveyance of the land to which the stock is appurtenant, either directly or upon a foreclosure sale, creates an implied contract by the grantor or former owner to yield up the certificate to the grantee of the land.⁴

Pledge or Mortgage of Shares.

§ 218. **Mortgage.**—Shares of stock are personal property, but are not of the class upon which a chattel mortgage, as defined by statute, may be given. Stock may, however, as between the parties, be mortgaged, and such mortgage is valid and binding without delivery of possession; but under California statutes, such mortgage would be void as to creditors and subsequent purchasers in good faith for a valuable consideration.⁵ But where a mortgage of shares is permitted by statute, it has been held that to render the mortgage effectual nothing more is required than a compliance with the statutory provisions; and where such formality is not required by the statute, a transfer on the books is not necessary to the validity of the mortgage.⁶ If, however, stock is transferred on the books to the mortgagee of such stock, a mere equity remains in the hands of the mortgagor.⁷ It has been held that a lien on shares for unpaid subscriptions is not a mortgage within the meaning of section 726 of the Code of Civil Procedure requiring foreclosure.⁸ Where, of course, stock is mortgaged with land as appurtenant thereto, the stock passes with the land under a foreclosure sale.⁹

4. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54. See *Boob v. Hall*, 107 Cal. 160, 40 Pac. 117, where description in instrument of sale included shares in water company and it was held that any title which the vendor had passed thereby.

5. *Tregear v. Etiwanda Water Co.*, 76 Cal. 637, 9 Am. St. Rep. 245, 18 Pac. 658. See CHATTEL MORT-

GAGES, vol. 5, p. 46, as to personal property which may be mortgaged.

6. *Ede v. Johnson*, 15 Cal. 53.

7. *Edwards v. Beugnot*, 7 Cal. 162.

8. *San Gabriel Valley Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

9. *San Gabriel Valley Ban v. Lake View etc. Co.*, 4 Cal. App. 630, 89 Pac. 360. See supra, § 217.

§ 219. Pledge in General.—Inc corporeal property, such as shares of stock in a corporation, cannot be pledged without a written transfer of the title,¹⁰ or its equivalent.¹¹ The theory underlying this rule is that the shares as distinguished from the certificate therefor, which is but the muniment or evidence of title of the holder to a portion of the property of the corporation, is incapable of manual delivery, and a delivery of possession is essential to the validity of the pledge.¹² The written transfer of title performs the same office that delivery of possession does in the case of a pledge of corporeal property, and constitutes the evidence of the pledgee's right of property in the thing pledged.¹³ But mere delivery by way of pledge of the certificate is held to vest in the pledgee an equitable title to the shares which may be enforced as between the parties, and where the rights of third parties have not intervened.¹⁴ However, it is not essential to the creation of a valid pledge that a transfer upon the books of a corporation be made.¹⁵

§ 220. Pledge Distinguished from Sale of Stock.—The owner of stock remains such until he is divested of his ownership by law or by his voluntary act. The mere

10. Hall v. Cayot, 141 Cal. 13, 74 Pac. 299; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237. See PLEDGE.

11. Hall v. Cayot, 141 Cal. 13, 74 Pac. 299.

12. Hall v. Cayot, 141 Cal. 13, 74 Pac. 299.

13. Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

14. Hall v. Cayot, 141 Cal. 13, 74 Pac. 299; McFall v. Buckeye etc. Warehouse Assn., 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253; Malone v. Johnson, 5 Cal. Unrep. 575, 47 Pac. 579 (holding that a second manual delivery is unneces-

sary to perpetuate the lien upon making of a new note, if the pledgee still holds possession under the first delivery).

15. Seymour v. Salsberry, 177 Cal. 755, 171 Pac. 938; Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., 174 Cal. 308, 163 Pac. 47; Hall v. Cayot, 141 Cal. 13, 74 Pac. 299; Hurlburt v. Arthur, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734; Spreckels v. Nevada Bank, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329; Young v. New Pedrara Onyx Co., 32 Cal. App. Dec. 439, 192 Pac. 55.

transfer of his property to another does not divest him of his ownership, unless such was the intent manifested by suitable acts. And so, when a debtor deposits property with his creditor, in the absence of any showing as to the purpose with which the deposit is made or received, it is presumed that it was intended as a collateral security for the debt.¹⁶ And one may prove by parol that what purports to be an absolute transfer is solely by way of security.¹⁷ But a transaction cannot be regarded as a sale of stock where there is nothing said by either party in reference to buying or selling the stock, and its value is not agreed upon or even discussed nor its price fixed. And in addition to the necessity for a price, there must be an assent by the parties that the transaction shall be a sale; and this must be an express agreement or such an implication must follow from the nature of the transaction itself.¹⁸

§ 221. Rights and Liabilities of Pledgee.—A pledgee of corporate stock, even though the pledge be not entered on the books, becomes vested with a legal interest or special property.¹⁹ The certificate assigned to him is recognized as evidence of right and ownership and confers upon the holder thereof the right to protect that special interest.²⁰

16. *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

17. *Shattuck & Desmond etc. Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348. See PLEDGE.

18. *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737. See SALES.

19. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 163 Pac. 47; *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55. See PLEDGE.

20. *Herbert Kraft Co. Bank v.*

Bank of Orland, 133 Cal. 64, 65 Pac. 143 (holding that a pledgee of stock has the right to maintain a suit in equity against the corporation to protect and enforce his special interest in such stock).

See note, 9 A. L. R. 1619, as to pledgee of corporate stock as security for an antecedent debt as a bona fide purchaser within the rule which protects such purchasers against the equities of third persons; and see note, 1 A. L. R. 664, as to rights inter se of customers whose stocks have been repledged by broker.

And he may claim the property so pledged from third persons by suit if necessary, unless they have a higher equity or other right superior to his own;¹ or he may bring a suit for damages for conversion.² The pledgee has the right to dividends upon the stock, if any such are paid,³ and if the pledgor fails to vote the stock, it may be voted by the pledgee.⁴ A pledgee, of course, is not liable as a stockholder, unless he holds the stock as owner upon the books,⁵ and even then, he is entitled to recover from his pledgor what he has been forced to pay as registered owner of the stock.⁶

§ 222. Right to have Pledge Entered on Books.—Section 324 of the Civil Code is general in its terms and applies not merely to sales of stock but to all transfers thereof, and so it has been held that under this section a pledgee of stock has the right, for his protection, to cause a proper entry of the transaction between himself and the pledgor to be entered on the books of the corporation.⁷ The view that the pledgee's rights are fully protected by his power to give notice to an intending purchaser of his prior claim has been said to be too strained and narrow.

1. *Seymour v. Salsberry*, 177 Cal. 755, 171 Pac. 938; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. As to whom the transfer is valid, see *infra*, § 223 et seq.

2. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. See *BAILMENTS*, vol. 4, p. 12.

3. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. See *infra*, § 259, as to who are entitled to dividends.

4. See *infra*, § 289.

5. See *infra*, § 385 et seq.

6. *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073.

7. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582 (where it is said that the owner of stock may have pledged it as security for his indebtedness and the creditor may have caused it to be transferred to his own name upon the books of the corporation without changing its ownership); *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329; *American Trust etc. Co. v. Union Security Co.*, 43 Cal. App. 126, 184 Pac. 508.

He should not be obliged to be on the constant watch to prevent dealings with stock which has been hypothecated to him, at the peril of losing his security if he fails to give actual notice of his right to a subsequent intending purchaser or transferee.⁸ All that section 324 of the Civil Code exacts of a pledgee to protect his interests is that the transaction and the nature of same be so entered upon the books as to show the names of the pledgor and the pledgee, the number or designation of the shares and the date of the transfer;⁹ and he has a right to compel the corporation to make these entries on the books.¹⁰ All this may be done to the full protection of the pledgee's rights, however, without the surrender of the certificates, their cancellation and issuance to him of new ones.¹¹ And unless this form of procedure be necessary to his protection, it will not be adjudged within his rights, for the effect of it would be to imperil valuable rights and privileges of the pledgor;¹² but where the pledgee has the stock transferred to him on the books to protect his rights, he does not thereby convert the stock.¹³ The notation of the pledge protects the pledgor and the entry charges a subsequent purchaser with the constructive notice which the entries

8. Spreckels v. Nevada Bank, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329.

9. Spreckels v. Nevada Bank, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329.

10. American Trust etc. Co. v. Union Security Co., 43 Cal. App. 126, 184 Pac. 508.

When a request is made by the pledgee for a new certificate, it is the duty of the secretary, notwithstanding he thinks it proper to issue a new certificate, to make in addition to such issuance proper entries on the stock and transfer books of the character in which the stock is held; Welch v. Giljelen, 147 Cal. 571, 82 Pac. 248.

11. Spreckels v. Nevada Bank, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329; American Trust etc. Co. v. Union Security Co., 43 Cal. App. 126, 184 Pac. 508. See Manning v. App Consol. Gold Min. Co., 171 Cal. 610, 154 Pac. 301, where it is said to be an irregularity as against the pledgee to issue certificates for capital stock as reduced without naming him therein as pledgee.

12. Welch v. Giljelen, 147 Cal. 571, 82 Pac. 248; Spreckels v. Nevada Bank, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329.

13. Foto v. Bussell, 31 Cal. App. Dec. 1, 187 Pac. 432.

on the books import.¹⁴ But a mere entry on the margin of the stub of the certificate that one holds as security for a loan does not amount to a transfer on the books.¹⁵

Legal Effects of Unregistered Transfers.

§ 223. **In General.**—The statute provides that a transfer of stock is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties, by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of transfer.¹⁶ Under an act of similar import,¹⁷ it has been held that such an unregistered transfer is, however, invalid only as against a third party who has some legal and existing claim against the property. Thus, if the corporation has no such interest, it cannot object to a demanded transfer.¹⁸ Nor is it the purpose of statutes of this general character to declare unregistered transfers void at law or in equity so as to prevent the transferee bringing a suit against fraudulent trustees who are wasting the assets of the corporation.¹⁹

The mere fact that the transferee takes the paper certificate and does nothing more cannot be said to be a substantial compliance with section 324 of the Civil Code.²⁰ And the requirements of the statute are not satisfied by a mere entry on the certificate stub to the effect that the holder holds as security for a loan,¹ or by the insertion of

14. *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329; *American Trust etc. Co. v. Union Security Co.*, 43 Cal. App. 126, 184 Pac. 508.

15. *McFall v. Buckeye etc. Warehouse Assn.*, 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

16. Civ. Code, § 324. See, also, *supra*, § 186, for code provisions.

17. Acts of 1854, p. 84, § 20.

18. *People v. Crockett*, 9 Cal. 112.

19. *Parrott v. Byers*, 40 Cal. 614 (under Stats. 1850, p. 348).

20. *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280.

1. *McFall v. Buckeye etc. Warehouse Assn.*, 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

the name of a person as co-owner in the original certificate.² Where, however, there has been a demand for a transfer which has not been complied with, for corporate purposes it may be treated as though the transfer has been made.³

§ 224. Passage of Title Between Parties.—The registration of a transfer is not essential to a valid transfer of title between the parties, whether the transfer be absolute,⁴ or by way of pledge.⁵ And this is the rule even though the certificates of stock recite that the stock is transferable only on the books of the corporation.⁶ The effect of section 324 of the Civil Code is said to be analogous to that of the statutes with reference to the recording of instruments affecting real property. The delivery of the indorsed certificate passes title, but such title cannot be asserted against purchasers or encumbrancers who have no notice of the transfer.⁷ The title passing, if not the complete legal title, is in legal consequences equivalent to it.⁸ As against the corporation itself, however, the

2. *Whitcomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887.

3. *Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177; *Guaranty Loan Co. v. Treadwell*, 35 Cal. App. Dec. 643, 200 Pac. 653.

4. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 22 Pac. 665; *Stowe v. Harvey*, 241 U. S. 199, 60 L. Ed. 953, 36 Sup. Ct. Rep. 541; see, also, *Rose's U. S. Notes*.

5. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 163 Pac. 47;

Spreckels v. Nevada Bank, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329. See, also, cases cited *supra*, § 221; Civ. Code, § 324.

6. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494; *Stowe v. Harvey*, 241 U. S. 199, 60 L. Ed. 953, 36 Sup. Ct. Rep. 541, see, also, *Rose's U. S. Notes*.

7. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 163 Pac. 47.

8. *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494.

transferee takes a mere equity, and is not assignee of the legal title before entry on the books.⁹

§ 225. Effect as Between Corporation and Parties to Transfer.—Under section 324 of the Civil Code, the party in whose name stock stands, as between himself and the corporation or its creditors, must for all purposes be deemed the owner.¹⁰ Thus, for the purpose of ascertaining the liability of stockholders on assessments,¹¹ or upon unpaid subscriptions,¹² the books of the corporation are the guide. This is not true, however, as to the statutory liability of stockholders' debts, in which case the definition of a stockholder includes unregistered stockholders as well as those appearing of record.¹³ The records of the corporation afford the criterion as to who are stockholders for the purposes of meetings of stockholders,¹⁴ notices,¹⁵ voting,¹⁶ or the payment of dividends.¹⁷ As between the transferee and the corporation, the former secures only an equitable title, having no right other than that of having the transfer properly entered on the books.¹⁸ But for the purpose of redress of corporate injuries as against fraudulent trustees, an unregistered stockholder may sue on behalf of the corporation.¹⁹

§ 226. Rights Between Transferor and Transferee.—Although as between the corporation and the parties to

9. *Jennings v. Bank of California*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852; *People v. Robinson*, 64 Cal. 373, 1 Pac. 156.

10. *Borland v. Haven*, 37 Fed. 394, 13 Sawy. 551.

11. See *infra*, § 348.

12. See *infra*, § 312.

13. See *infra*, § 384.

14. See *infra*, § 286 et seq.

15. *Whitcomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887 (holding that a corporation is not bound

to recognize unregistered transferees as stockholders when giving notice of an assessment).

16. See *infra*, § 287.

17. See *infra*, § 258.

18. *People v. Robinson*, 64 Cal. 373, 1 Pac. 156.

19. *Parrott v. Byers*, 40 Cal. 614 (of course, in such case there is no question between the corporation and the stockholder, but only between the corporation and the unfaithful trustees). See *infra*, § 270.

the transfer, the corporation is bound to recognize only the registered holder of the stock, it is true, of course, that as between the transferor and the transferee, the transferor who has been made to pay a call or assessment has a right of recovery over against his transferee.²⁰ Likewise, in the case of unpaid subscriptions, the registered owner is primarily liable to the corporation for the balance due on the unpaid stock.¹ Pursuant to this rule, where the vendee refuses to accept or pay for stock pursuant to his agreement with the vendor, the latter must at his peril take care of and protect the property by the payment of assessments thereon, and is entitled to compensation therefor as damages consequential to the breach of the contract.² And since as between pledgor and pledgee the corporation looks to the pledgor of stock for the payment of assessments thereon, even though record of the pledge appears on the books of the company, where payment of the assessments is made by the pledgee he is entitled to recover over against the pledgor for the amounts so paid.³

§ 227. Subsequent Bona Fide Transferees of Registered Holder.—By virtue of the statute declaring unrecorded transfers not to be valid, except as to the parties thereto, transfers of stock must be entered on the books to render them valid as against subsequent purchasers without notice.⁴ Unrecorded transfers are nevertheless valid as against all the world, except subsequent purchasers in

20. *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280.

1. *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 293, 108 Pac. 711.

2. *Gay v. Dare*, 103 Cal. 454, 37 Pac. 466.

3. *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073.

4. *Smitton v. McCullough*, 182

Cal. 530, 189 Pac. 686; *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 163 Pac. 47; *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299; *Winter v. Belmont Min. Co.*, 53 Cal. 428. See *infra*, § 228, as to purchaser at sheriff's sale.

good faith for value and without notice.⁵ Actual notice to an intending purchaser by one having a prior claim upon the stock, even though such claim is not noted on the books, is sufficient.⁶ Thus, a pledge is good against a subsequent purchaser, if the latter has notice of it at the time of purchase; but if the purchaser does not have notice of the pledge, or notice of circumstances sufficient to put a prudent person upon inquiry, he takes whatever title the vendor had, free and unincumbered by any claim of the pledgee.⁷ Whether circumstances are sufficient to put a purchaser on inquiry and thus impart notice is a question of fact for the trial court.

§ 228. Purchaser at Sheriff's Sale.—A purchaser at an attachment or execution sale under a judgment who purchases in good faith and without notice of a previous assignment of the stock by the judgment debtor, takes the stock discharged of a pledgee's lien,⁸ provided he pays

5. *Seymour v. Salsberry*, 177 Cal. 755, 171 Pac. 938; *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299 (holding that where the rights of such third parties are not involved, the provision of the statute as to entry on the books is inapplicable and a finding thereon is immaterial); *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Parrott v. Byers*, 40 Cal. 614; *Mead v. Elmore*, 1 Cal. Unrep. 441; S. C., *People v. Elmore*, 35 Cal. 653; *American Trust etc. Co. v. Union Security Co.*, 43 Cal. App. 126, 184 Pac. 508. See *Weston v. Bear River etc. Min. Co.*, 5 Cal. 186, 63 Am. Dec. 117, contra (overruled in effect, S. C., 6 Cal. 425). See *Strout v. Natoma etc. Min. Co.*, 9 Cal. 78, where a pledge not entered on the books is said to be void as

to third parties; and *Manning v. App Consol. etc. Mining Co.*, 171 Cal. 610, 154 Pac. 301, where a pledge not entered on the corporation books is said to be good only as between the parties.

6. *Spreckels v. Nevada Bank*, 113 Cal. 272, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329; *American Trust etc. Co. v. Union Security Co.*, 43 Cal. App. 126, 184 Pac. 508.

7. *Young v. New Pedrara Onyx Co.*, 32 Cal. App. Dec. 439, 192 Pac. 55.

8. *West Coast etc. Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *Bacon v. Traders' Oil Corp.*, 34 Cal. App. Dec. 928, 201 Pac. 477; *Woodstone Marble etc. Co. v. Dunsmore etc. Water Co.*, 31 Cal. App. Dec. 1045, 190 Pac. 213 (holding rule inapplicable to stock of water com-

value for the stock.⁹ And a purchaser at a sale under his own judgment, without actual or constructive notice of alleged defects in title, is a bona fide purchaser for value.¹⁰ In order that an assignee or pledgee of a certificate may protect his rights, as against a purchaser at an execution sale, he must have caused a reissue to himself of the certificate and a proper transfer on the books of the corporation to be made;¹¹ and even after judgment he may avoid loss by seeing that the purchaser at the execution sale takes with notice of his lien.¹² A party who purchases at an execution sale knowing that the certificates have been previously hypothecated takes subject to the claim of the pledgee, for if he knows of the previous hypothecation, he is not a purchaser in good faith, and therefore not entitled to relief in a court of equity.¹³ Likewise, one who knows that the execution debtor has transferred the stock, or is not the owner thereof, acquires no better title than was possessed by the debtor.¹⁴ But the holder of a

pany appurtenant to the land); *American Trust etc. Co. v. Union Security Co.*, 43 Cal. App. 126, 184 Pac. 508. See *Jackins v. Queen Oil Co.*, 184 Cal. 645, 195 Pac. 51, where the court found that a purchaser had notice of pledge since his agent was secretary of the corporation.

9. *Security etc. Sav. Bank v. Imperial Water Co.*, 183 Cal. 488, 192 Pac. 22.

10. *American Trust etc. Co. v. Union Security Co.*, 43 Cal. App. 126, 184 Pac. 508.

11. *West Coast etc. Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600.

12. *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600. See, also, *Security etc. Sav. Bank v. Imperial*

Water Co., 183 Cal. 488, 192 Pac. 22, and *West Coast etc. Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622, where it is stated that the right may be protected by serving notice on the corporation that he holds the certificate as such assignee or pledgee. This obviously gives no notice to the execution purchaser, however, unless it is noted on the books.

13. *Weston v. Bear River etc. Min. Co.*, 6 Cal. 435 (overruling in effect, 5 Cal. 186, 63 Am. Dec. 117; *Mead v. Elmore*, 1 Cal. Unrep. 441); *S. C., People v. Elmore*, 35 Cal. 653.

14. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Blake-man v. Puget Sound Iron Co.*, 72 Cal. 321, 13 Pac. 872; *Bacon v.*

lien has no right to an injunction to prevent a sale under the execution of whatever interest remains in the pledgor under an unregistered pledge.¹⁵

§ 229. Priority of Attaching Creditor Before Sale.—An attaching creditor levying execution is not within the exception of a subsequent purchaser in good faith without notice.¹⁶ The general rule is that a creditor who attaches property for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of levy,¹⁷ to which rule there is an exception where the statute declares a transfer void as to creditors of the transferor.¹⁸ The effect of section 324 of the Civil Code, however, is not to make an unregistered transfer void and subject to attachment or execution against the previous owner,¹⁹ as is shown by the fact that knowledge of the attaching creditor or execution purchaser will vitiate the title conveyed by the execution sale.²⁰ The rule in California, therefore, is that a sale or pledge of a certificate of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor or pledgor, and that the failure of the purchaser or pledgor to obtain a

Traders' Oil Corp., 34 Cal. App. Dec. 928, 201 Pac. 477.

15. *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600.

16. *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600.

17. See *ATTACHMENT*, vol. 3, p. 482.

18. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676 (citing as examples of this exception, cases under statutes such as Civ. Code, § 3440, making transfers void as to creditors where there is no continued change of possession, and also citing cases of unrecorded

chattel mortgages under section 2957 of the Civil Code). See *ATTACHMENT*, vol. 3, pp. 483, 484.

19. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Weston v. Bear River etc. Min. Co.*, 6 Cal. 425 (construing act of April 22, 1850, §§ 12 and 144, section 12 being identical with Civ. Code, § 324; and overruling *S. C.*, 5 Cal. 186, 63 Am. Dec. 117).

20. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Weston v. Bear River W. & Min. Co.*, 6 Cal. 425. See *supra*, § 228.

registry of the stock is not fatal to his interest in the stock as against such attachment.¹ Public policy and legitimate demands of trade have, it is said, caused courts and legislatures to establish this doctrine, and the rule, having been the basis upon which the commercial business has been carried on for many years, is now protected by the principle of *stare decisis*.² The opposite rule is founded on the notion that the stock and transfer book is a public record accessible to all persons, intended to give notice to everybody of the status and ownership of the title to stock.³ Creditors of individual stockholders in California, however, have no such right of access,⁴ and the public has no access thereto, hence the person in whose name stock is registered is not thereby held out to the world as the owner.⁵

1. *Security etc. Sav. Bank v. Imperial Water Co.*, 183 Cal. 488, 192 Pac. 22; *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Weston v. Bear River etc. Min. Co.*, 6 Cal. 425 (declaring for a contrary doctrine to that sustained in the same case, 5 Cal. 186, 63 Am. Dec. 117.) See discussion by Justice Shaw in *National Bank etc. v. Western Pac. R. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676).

2. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

3. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676 (stating the rules and reviewing the deci-

sions). See *Weston v. Bear River etc. Min. Co.*, 5 Cal. 186, 63 Am. Dec. 117, founded upon this rule, and S. C., 6 Cal. 425, taking the contrary view. And see *Strout v. Natoma etc. Min. Co.*, 9 Cal. 78, stating this rule, but where there was no contest between an unregistered pledgee or transferee and a subsequent purchaser, the lien and the rights of the execution purchaser having been merged.

4. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

5. *National Bank of Pacific v. Western Pac. Ry. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; *Stowe v. Harvey*, 241 U. S. 199, 60 L. Ed. 593, 36 Sup. Ct. Rep. 541, see, also, Rose's U. S. Notes.

X. RELATION AND RIGHTS OF STOCKHOLDERS IN GENERAL.

Nature and Existence of Relation.

§ 230. **In General.**—Stockholders constitute the corporation, have a direct interest in it,⁶ but as creditors are in a different class from creditors who are not stockholders. Hence, it is not obnoxious to the constitutional prohibition against class or special legislation to subject them to special burdens from which ordinary creditors are exempt.⁷ As between the stockholder or member and the corporation, the books and records of the corporation constitute the evidence of their relation. The certificate of stock is but secondary evidence and, it has been said, is not demanded except when the stockholder deals with the corporation in a contract relation.⁸ The general obligation of the corporation to its stockholders is to conduct fairly and impartially the business of the company in such manner as will best promote the interest of all concerned.⁹

§ 231. **Who may be Stockholders.**—The state itself is expressly forbidden by the constitution from subscribing to or being interested in the stock of any corporation,¹⁰ nor may a political subdivision of the state become a stockholder.¹¹ There is nothing in California statutes re-

6. *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913D, 1094, 119 Pac. 516; *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059; *Wolters v. Henningsan*, 114 Cal. 433, 46 Pac. 277; *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077 (holding stockholders liable under a statute making persons interested in the use of a distillery subject to federal revenue tax). See *infra*, § 236.

7. *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059 (holding constitutional a provision making the assets of savings bank a security

to depositors and stockholders, but giving nonstockholding depositors a priority over stockholders who are also depositors. See, generally, as to class legislation, CONSTITUTIONAL LAW, vol. 5, p. 823 et seq.

8. *People v. Robinson*, 64 Cal. 373, 1 Pac. 156.

9. *Kilbride v. Moss*, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812.

10. Const., art. XII, § 13; Const. art. IV, § 31.

11. Const., art. IV, § 31. See *Low v. City of Marysville*, 5 Cal. 214 (municipal corporation as a

quiring residence in the state as being necessary to eligibility for membership in a corporation,¹² although a majority of the incorporators are required to be residents of the state.¹³ Aside from those limitations which relate to the capacity of persons to contract,¹⁴ speaking generally, there is no qualification as to age required of stockholders, although in particular classes of corporations there are such limitations.¹⁵ Corporations, when properly empowered by their charters, may hold stock in other corporations.¹⁶ And shares of stock may be held by a married woman and transferred without the signature of her husband.¹⁷

§ 232. Contractual Nature of Relation.—The relation of a stockholder to the corporation is one of contract, either express or implied.¹⁸ It exists only where the minds of the parties have met; e. g., that the one to whom the stock was issued agreed to be and become a stockholder, with the privileges and responsibilities of that relation, and that the corporation accepted him as such.¹⁹ Hence, one

stockholder). See, *supra*, § 44, as to who may be incorporators; and *supra*, § 164, as to who may be subscribers.

12. *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

13. Civ. Code, § 285.

14. See Civ. Code, §§ 1556, 1557. And see *infra*, § 232, as to contractual relation of stockholders.

15. Civ. Code, § 561, as to home-stead corporations; Civ. Code, § 643, as to land and building corporations; and Civ. Code, § 653c, and *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 630, as to co-operative business associations.

16. See *infra*, § 570.

17. Civ. Code, § 325. See *supra*, § 191, as to transfer of stock by married women.

18. *Shattuck & Desmond etc. Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *California National Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414. And cases cited *infra*.

19. *Shattuck & Desmond etc. Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *California National Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414; *Cornwall v. Burning Moscow etc. Min. Co.*, 1 Cal. Unrep. 172.

Any agreement by which one shows his intention to become a stockholder is sufficient; *Doty v. California Rice Milling Co.*, 37 Cal. App. 449, 174 Pac. 389. See *infra*, § 386.

cannot be made a stockholder, without his consent, simply because an officer of the corporation, without authority, has entered his name upon the books as a stockholder and caused stock to be issued in his name.²⁰ The stockholders' contract of membership is evidenced by the certificate for his shares,¹ and his contract is governed by the laws of the state of incorporation, unless the stockholders have contracted with reference to the laws of another state.²

§ 233. Interest as Disqualifying Witness, Judge or Notary.—At common law, a witness was disqualified because of interest, and the interest of a stockholder, although not a party to the record, rendered him incompetent as a witness.³ But since interest no longer disqualifies a witness, a stockholder is a competent witness,⁴ and even where by statute parties to an action are disqualified, nevertheless, the statute does not exclude a stockholder of a corporation

20. *Shattuck & Desmond etc. Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *Mahan v. Wood*, 44 Cal. 462; *Mudgett v. Horrell*, 33 Cal. 25; *California National Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414.

1. *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440. See *People v. Robinson*, 64 Cal. 373, 1 Pac. 156, to effect that the certificate is secondary evidence of the relation.

2. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; *Peck v. Noee*, 154 Cal. 351, 97 Pac. 865; *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. Rep. 312, see, also, *Rose's U. S. Notes*; *Piney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125, 33 Sup. Ct. Rep. 52, see, also, *Rose's U. S. Notes*. See

infra, §§ 371, 372. And see *CONFLICT OF LAWS*, vol. 5, p. 465 et seq.

3. *Richter v. Henningsan*, 110 Cal. 530, 92 Pac. 1077; *City of San Diego v. San Diego etc. R. Co.*, 44 Cal. 106; *Blen v. Bear River etc. Min. Co.*, 20 Cal. 602, 81 Am. Dec. 132; *Wolf v. St. Louis etc. Water Co.*, 15 Cal. 319; *Mokelumne Hill Canal etc. Co. v. Woodbury*, 14 Cal. 265; *McAuley v. York Min. Co.*, 6 Cal. 80.

One who had ceased to be a stockholder before the action was brought was a competent witness in an action against the company. *Tuolumne County Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 193.

4. *Merriman v. Wickersham*, 141 Cal. 567, 75 Pac. 180; *City Savings Bank v. Enos*, 135 Cal. 167, 67 Pac. 52. See *Code Civ. Proc.*, § 1879; and see *WITNESSES*.

from testifying, even though he is in addition a director or officer thereof.⁵

The statute in California limits the disqualification of a judge for relationship to cases where the relative is an officer or agent of the corporation.⁶ And a stockholder is not in any sense a "party" to an action, within the meaning of a statute disqualifying a judge from acting in actions in which he is related to either party, where the action is by or against the corporation itself as a legal entity,⁷ but if the judge himself holds stock in the corporation, he is interested in the action within the meaning of the statute, and disposal of the stock after trial but before judgment does not remove his disqualification; and there is no difference in the case where the corporation is a party and one in which the corporate property is involved, although the corporation is not a party.⁸

It is the rule in California that a notary public exercises no judicial functions, and that his relation as stockholder of a corporation party to an instrument does not disqualify him.⁹ Nor does his relation as stockholder disqualify him from taking the acknowledgments of stockholders as

5. *Merriman v. Wickersham*, 141 Cal. 567, 75 Pac. 180 (under statute, Code Civ. Proc., § 1880, disqualifying parties to action against an executor or administrator upon a claim against estate of deceased person as to matter or fact occurring before death of such deceased person).

6. *Favorite v. Superior Court*, 181 Cal. 261, 184 Pac. 15 (under Code Civ. Proc., § 170, see subd. 2 thereof).

7. *Favorite v. Superior Court*, 181 Cal. 261, 184 Pac. 15 (judge was not disqualified because his wife held stock); *Bank of Lassen County v. Sherer*, 108 Cal. 513, 41 Pac. 415 (where judge never owned stock and an uncle who had owned stock

disposed of it prior to the action). See *Robinson v. Southern Pac. Co.*, 105 Cal. 526, 28 L. R. A. 773, 38 Pac. 94, 722, holding that a justice of the supreme court was not within the prohibited degree of relationship to a stockholder.

8. *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815 (where the judge was a stockholder in a corporation holding a portion of a bond issue involved in the action). See *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077, as to disqualification of stockholder at common law to act as judge or juror. See JUDGE.

9. See ACKNOWLEDGMENTS, vol. 1, p. 245. And see *Farmers' Exch. Bank v. Purdy*, 130 Cal. 455, 62 Pac. 738, where question of validity

a necessary part of a corporate instrument, although of course it would not be valid as to his own acknowledgment.¹⁰

§ 234. Stockholders' Relations Inter Sese.—Stockholders of a corporation do not hold a fiduciary relation to each other as such.¹¹ A stockholder is not, therefore, precluded from voting at a meeting upon any question in which he has an individual interest, adverse to that of any of the other stockholders,¹² as is the case with directors.¹³ Moreover, the relation of stockholders inter sese is not that of partners.¹⁴ But fiduciary relations may exist between stockholders of various corporations who have associated themselves to control such corporations and make them work in harmony.¹⁵ The ordinary rule is that, in the absence of provision to the contrary in the certificates of stock, or in the resolutions, by-laws or charter authorizing its issue, or in other writings, the stockholders are to be regarded as being equal in right, which is but an obvious application of the familiar principles of contract to the relations of the parties.¹⁶

was raised, but not decided since instrument was valid as between the parties even though not acknowledged.

10. *Greve v. Echo Oil Co.*, 8 Cal. App. 275, 96 Pac. 904.

11. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889. See also *infra*, § 444 et seq.

12. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

13. See *infra*, § 448.

14. *Brown v. Merrill*, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557; *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509. See, as to right of stockholder to enforce rights

against other stockholders, *infra*, §§ 242, 404.

15. *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16.

16. *Richey v. East Redlands Water Co.*, 141 Cal. 221, 74 Pac. 754 (holding that rights to water as stockholders of water company cannot be regarded as adverse either to fellow-stockholders or to the corporation, in view of the relations of the parties, hence no rights by prescription can be acquired). See *Quartz Glass etc. Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648, as to secret advantages given to one stockholder over others.

§ 235. **Termination of Relation.**—The relation of a stockholder to the corporation may be terminated by the transfer of his stock and the acceptance of the transferee as a stockholder by the entry of the transfer on the books of the company.¹⁷ The relation of stockholder and corporation is also terminated by the forfeiture of stock for non-payment of assessments,¹⁸ although a sale of stock under an invalid assessment will not terminate the relation or prevent the assertion of the stockholders' rights as such.¹⁹ Inasmuch as the code forbids the withdrawal or payment to the stockholders of any part of the capital stock, except upon dissolution of the corporation, or at the expiration of its term of existence,²⁰ the relation of a stockholder cannot ordinarily be terminated by the parties by his withdrawal from the corporation and the return to him of his proportion of the capital, even though it is so provided by the by-laws.¹ In nonstock corporations, the corporation may make provisions in its constitution, articles or by-laws for the termination of the relationship of member and corporation by expulsion or suspension.² It has been held that from the cancellation of stock certificates on a certain day, the inference is not that the transferor held them until that day, but that he may have assigned them at some time prior to their cancellation.³

17. See § 412 as to transfer.

Stockholders have the right to sell their stock, even though they hold a majority, without the slightest regard to the wishes and desires or knowledge of the minority; *Ryder v. Bamberger*, 172 Cal. 791, 158 Pac. 753.

18. *American Well etc. Co. v. Blakemore*, 184 Cal. 343, 193 Pac. 773.

19. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376.

20. See Civ. Code, § 309.

1. *Vereoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375 (holding such by-law void under Civ. Code, § 309). See Civ. Code, § 639, as to withdrawals from building and loan associations; and see *BUILDING AND LOAN ASSOCIATIONS*, vol. 4, p. 682.

2. Civ. Code, § 599.

3. *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 22 Pac. 665.

Stockholder's Interest and Rights in General.

§ 236. Stockholder's Interest in the Corporation.—The interest of a stockholder of the ordinary corporation, as represented by the shares of stock, is two-fold, and is confined to the right to participate in the profits of the business and in the distribution of the assets.⁴ The several stockholders who are such at the date of distribution are entitled to participate in profits which may be made from time to time.⁵ Stockholders also have a right ultimately to share in the final distribution of the assets of the corporation when, from any cause, it shall cease to exist and its estate shall be administered,⁶ after payment of all demands and debts.⁷ The property after dissolution belongs, pro rata, to those stockholders who were such at date of dissolution,⁸ and one succeeding to the interest of a stockholder by purchase of his stock after forfeiture is entitled to participate in any distribution of the assets of the corporation.⁹

§ 237. Rights of Stockholders in Corporate Property.—Although stockholders have an insurable interest in the corporate property,¹⁰ they have no legal¹¹ or equitable

4. *Bent v. Second Extension Water Co.*, 34 Cal. App. Dec. 721, 197 Pac. 657. See *supra*, § 135.

5. *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *People v. Badlam*, 57 Cal. 594. See *infra*, § 253 et seq.

6. *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; *People v. Badlam*, 57 Cal. 594.

7. *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 43 Pac. 1111; *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077.

8. *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

9. *Lewis v. Miller & Lux*, 156 Cal. 101, 103 Pac. 496; *Carpenter v. Bradford*, 23 Cal. App. 560, 138 Pac. 946.

10. *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077.

11. *Newell-Murdoch Realty Co. v. Wickham*, 183 Cal. 39, 190 Pac. 359; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22

title thereto¹² in their individual capacities either as joint tenants, tenants in common, copartners or otherwise.¹³ They are not in any proper sense the owners of the corporate property,¹⁴ but the whole title is in the corporation,¹⁵ which holds it for the benefit of the stockholders, in whom is the beneficial interest.¹⁶ Thus, a title to corporate property is not conveyed by a deed by all the stockholders,¹⁷ or by the transfer of stock,¹⁸ or by a sale of corporate property under a judgment against an individual stockholder in an action to which the corporation is not a party.¹⁹ And one whose stock has been illegally sold by the corporation must sue for the return of the stock, and cannot sue for a specific interest in its property.²⁰ The corporation is the agent and trustee of the stockholders, in their behalf and for their use and benefit to hold, manage and control the corporate property and business.¹

Pac. 689; *McCormick v. Springfield etc. Ins. Co.*, 66 Cal. 361, 5 Pac. 617 (holding that an insurance policy based on application describing property of corporation as property of insured stockholders is invalid); *City of San Diego v. San Diego etc. R. Co.*, 44 Cal. 106; *Wright v. Oroville etc. Min. Co.*, 40 Cal. 20; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Gorham v. Gilson*, 28 Cal. 479.

12. *Gorham v. Gilson*, 28 Cal. 479.

13. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

14. *Bank of Visalia v. Smith*, 146 Cal. 398, 81 Pac. 542; *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077.

15. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607, and other cases cited herein.

16. *City of San Diego v. San*

Diego etc. R. Co., 44 Cal. 106; *Tulare Irr. Dist. v. Kaweah etc. Irr. Co.*, 5 Cal. Unrep. 330, 44 Pac. 662.

17. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Martin v. Zellerbach*, 1 Cal. Unrep. 335 (contract and deed of stockholder to convey corporate property is admissible for purpose of proving the existence and character of transaction subsequently ratified, where a subsequent ratification was relied on).

18. *Bank of Visalia v. Smith*, 146 Cal. 398, 81 Pac. 542.

19. *Bracia v. Nelson*, 42 Cal. 107.

20. *Smith v. Maine etc. Tunnel Co.*, 18 Cal. 111.

1. *W. F. Boardman Co. v. Petch*, 62 Cal. Dec. 97, 199 Pac. 1047; *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616; *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43

The goodwill of a business conducted by a corporation is the property of the corporation alone and can be transferred only by it,² and not by a stockholder.³ Hence where one sells stock in a corporation and enters into an agreement with the purchaser not to engage in business again, such a contract is void as in restraint of trade, and cannot be enforced as within an exception permitting one who sells the goodwill of a business to agree with the buyer to refrain from carrying on a similar business within specified limits.⁴ As between themselves, however, stockholders are the beneficial owners of the property held by the corporation.⁵

L. R. A. (N. S.) 1112, 129 Pac. 781; *People v. Badlam*, 57 Cal. 594; *Wright v. Oroville etc. Min. Co.*, 40 Cal. 20. Since the stockholders individually cannot sue or be sued in respect to their interests in the property held in the name of the corporation, it has been held that summarily to turn a corporation out of court is to deny the real parties in interest—the stockholders—the right to protect their property according to law; *San Diego Gas Co. v. Frame*, 137 Cal. 441, 70 Pac. 295; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689. See *Riverside Water Co. v. Sargent*, 112 Cal. 230, 44 Pac. 560, where it was held that a ditch company might defend as trustee for all its shareholders to establish its claim to all water owned and controlled by it for their benefit.

2. *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879.

3. *Merchants' Ad-sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468.

4. *Chamberlain v. Augustine*, 172 Cal. 285, 156 Pac. 479; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Merchants' Ad-sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468; *Cavasso v. Downey*, 31 Cal. App. Dec. 381, 188 Pac. 594. See Civ. Code, §§ 1673, 1674, as to contracts in restraint of trade. See *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628, where court held that the business of abstracting was separate from the property of the incorporated abstract company, and that the location of the legal title to the property in no way determined who was carrying on the business of abstracting. The corporation was incorporated for the purpose of raising money by the pledge of the stock, all of which was owned by the abstractor. See as to contracts in restraint of trade, *CONTRACTS*, ante, p. 133 et seq.

5. *W. F. Boardman Co. v. Petch*, 62 Cal. Dec. 97, 199 Pac. 1047; *Rossi v. Cairo*, 174 Cal. 74, 161 Pac. 1161.

§ 238. Stockholder's Dealings With Corporation.—A corporation may sell property owned by it for any adequate consideration, and such sale may be to a stockholder as well as to a third person.⁶ And generally, it may enter into an agreement with stockholders to do or refrain from doing something when such action or abstention is not contrary to express law or public policy.⁷ On the other hand, a stockholder may sell land to the corporation at an agreed price.⁸ Stockholders, as creditors of the corporation, may secure preferences over other creditors, and it has been held that a deferred creditor cannot claim a preference over such stockholders where the relief is not sought against them as stockholders on their liability as such.⁹ A creditor who is a stockholder does not lose his rights as a creditor merely because he is a stockholder.¹⁰ But of course a stockholder who is acting as the agent of a third person and also acting for the corporation in a sale of property to the corporation is bound, as an agent, to disclose to the vendor his adverse interest as a stockholder; and where such interest is not disclosed,

6. *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521 (holding that sale to a stockholder is not a diversion or withdrawal of capital prohibited under Civ. Code, § 309).

7. *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303 (holding that a corporation might agree with a stockholder for nonassessability of its stock; this holding was overruled in *Martin v. Palmer Union Oil Co.*, 184 Cal. 386, 193 Pac. 950, which held that such a provision must be made in the articles as it constitutes preference). See *Fox v. Mackay*, 125 Cal. 57, 57 Pac. 670, holding that a stockholder as such owes no duty to the corporation to

disclose his interest in a contract made by the corporation. See *infra*, § 462, as to contracts with stockholders for compensation as officers.

8. *Blood v. La Serena Land etc. Co.*, 134 Cal. 361, 66 Pac. 317.

9. *Bank of Visalia v. Dillonwood Lumber Co.*, 148 Cal. 18, 82 Pac. 374 (where stockholders had preferred laborers' liens).

10. *Richardson v. Chicago Packing etc. Co.*, 6 Cal. Unrep. 606, 63 Pac. 74. See *infra*, § 404, as to stockholders enforcing the liability of other stockholders under section 322 of the Civil Code. See *supra*, § 234.

the corporation will not be permitted to specifically enforce the contract.¹¹

§ 239. Stockholders Acting for Corporation.—Stockholders, individually or collectively, have no authority to perform corporate acts.¹² Thus, a vote had at a stockholders' meeting authorizing a contract has been held to be an absolute nullity;¹³ and a deed signed by the stockholders is not binding upon the corporation.¹⁴ For like reason, a finding that one is employed by stockholders affords no presumption or implication that the employment was at the instance or request of the corporation.¹⁵ Since, therefore, a corporation is not bound by the acts or admissions of its members, unless acting by its express authority,¹⁶ it is generally held that notice to an individual shareholder is not imputed to or binding upon the corporation,¹⁷ unless he is the owner of the entire capital stock of the corporation.¹⁸ And the agreements of a stockholder holding a large portion of the stock do not bind the corporation, unless it is a "one-man" corpo-

11. *Newell-Murdock Realty Co. v. Wickham*, 183 Cal. 39, 190 Pac. 359.

12. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

13. *Martin v. Zellerbach*, 1 Cal. Unrep. 335 (holding that the power to contract is vested in the board of directors). See *Savings Bank of San Diego County v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273, holding that stockholders cannot ratify execution of note.

14. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Gorham v. Gilson*, 28 Cal. 479. But see *Gordon v. Swan*, 43 Cal. 564, where a contract was made by all stockholders to assign their stock upon payment of money, accompanied by resolu-

tion of directors authorizing the president to convey the mine upon payment of the money the court saying the transaction was substantially as if the contract had been made with the corporation instead of the stockholders.

15. *Brown v. Valley View Min. Co.*, 127 Cal. 630, 60 Pac. 424.

16. *Shay v. Tuolumne Water Co.*, 6 Cal. 73.

17. *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834 (where it was alleged that the particular stockholders owned nearly all the issued stock); *Blood v. La Serena Land etc. Co.*, 134 Cal. 361, 66 Pac. 317.

18. *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740.

ration,¹⁹ or unless ratified by the directors.²⁰ Ordinarily, a stockholder's only control over the corporation is in voting for directors.¹

§ 240. Acts Binding Corporation as Binding Stockholder also.—A corporation represents and binds its stockholders in all matters within the limits of its corporate powers, so long as it acts in good faith and without fraud upon their rights. And so, with its right to maintain and defend actions concerning the corporate rights or liabilities, the stockholder cannot interfere except where the directors refuse to act or are guilty of fraud.² It is also a rule that for the purpose of the stockholders' liabilities, the necessary legal effect of the conditions of liability prescribed by law is that the corporation becomes the agent of the stockholder to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation, which contracts thus made bind the stockholders.³ And stockholders are held chargeable with knowledge of all acts of the directors which are spread upon the records, and all facts connected therewith that inquiry suggested thereby would disclose. A stockholder cannot avoid responsibility for unauthorized acts by abstaining from inquiry or by absenting himself from the company's meetings, and at the same time reap the benefits of the acts in case of success.⁴

19. See *supra*, § 14.

20. *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563.

1. *McFadden v. Board of Suprs. of County of Los Angeles*, 74 Cal. 571, 16 Pac. 397.

2. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776. See *infra*, § 263 et seq.

3. *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep.

163, 31 Pac. 846 (stockholder's individual liability for debts); *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776 (stockholder's liability for unpaid subscriptions); *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244 (stockholder's liability for assessments).

4. *Lady Washington Cons. Co. v. Wood*, 113 Cal. 482, 45 Pac. 809.

§ 241. **Acts of Majority Binding the Minority.**—The words “majority of shareholders” do not mean the same thing as “the holders of the majority of the stock.” Thus, if a statute requires a petition to be signed by a majority of the shareholders, a signing by those holding a majority of the stock may not be sufficient.⁵ When shares of a corporation or a majority of shares are spoken of in the statutes, the reference usually is to the subscribed or issued or outstanding shares.⁶ As a member of the corporation, the stockholder submits his wishes respecting its government and the management of its affairs to the will of the majority and is bound by the action that such majority take within the scope of the charter, even though protested against by him.⁷ But he is bound only to the extent of the ordinary incidents of the stock,⁸ for even the majority have not the right to direct the affairs of a corporation except in accordance with the provisions of its charter and agreement of the stockholders as set out therein.⁹ An agreement by even a large majority of the stockholders to change the terms of an existing contract which the statute has made between the whole body of stockholders would not bind a nonconcurring minority. If but a single stockholder owning but a single share of stock objects, his protest must be regarded.¹⁰

5. *Chollar Min. Co. v. Wilson*, 66 Cal. 374, 5 Pac. 670.

6. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

7. *Bornstein v. District Grand Lodge*, No. 4, 2 Cal. App. 624, 84 Pac. 271; *Graham v. Pasadena Land etc. Co.*, 152 Cal. 596, 93 Pac. 498 (holding that so far as a stockholder's rights as such are concerned, he is bound by the action of the proper majority of stock consenting to the transaction proposed, and the action of the

directors in accordance therewith, in the absence of fraud).

8. *Graham v. Pasadena Land etc. Co.*, 152 Cal. 596, 93 Pac. 498; *Bent v. Second Extension Water Co.*, 34 Cal. App. Dec. 721, 197 Pac. 657; *Bornstein v. District Grand Lodge No. 4*, 2 Cal. App. 624, 84 Pac. 271.

9. *Ashton v. Dashaway Assn.*, 84 Cal. 61, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091.

10. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac.

§ 242. Enforcement of Rights by Stockholder.—It is one of the well-recognized offices of the remedy by mandamus to enforce the plain rights of stockholders or members of corporations in the absence of any other adequate remedy, whether the right is based upon a duty expressly imposed by statute, or upon contract. Thus, mandamus will lie to restore to his corporate rights a member of a corporation who has been improperly disfranchised or irregularly removed from his connection with the corporation, although his right in this regard generally rests wholly upon his contract of membership.¹¹ And the same rule is applicable where a member is being excluded from participation in the benefits afforded by the corporation to its members and there is no other adequate remedy.¹² But if his holding of stock is void, the stockholder cannot enforce a stockholder's rights.¹³

Inspection of Corporate Records or Property.

§ 243. In General.—Section 14 of article XII of the constitution provides that every corporation other than religious, educational, or benevolent, organized or doing business in the state of California, must keep in an office

1050; Kohl v. Lilienthal, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

The majority stockholders have no right to divert the property of the corporation to other uses and purposes; Baker v. Ducker, 79 Cal. 365, 21 Pac. 764 (religious corporation). See, also, § 263 et seq., infra, as to suits by stockholder.

11. Miller v. Imperial Water Co. No. 8, 156 Cal. 27, 24 L. R. A. (N. S.) 372, 103 Pac. 227. See, also, Von Arx v. San Francisco etc. Verein, 113 Cal. 377, 45 Pac. 685; Peyre v. Mutual Relief Soc., 90 Cal. 240, 17 Pac. 217, and Otto v. Journey-

men Tailors' etc. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217, which were cases of mutual benefit societies.

12. Miller v. Imperial Water Co. No. 8, 156 Cal. 27, 24 L. R. A. (N. S.) 372, 103 Pac. 227 (right to water in mutual water company, deprivation of which would practically exclude the stockholder from membership). See infra, § 249, as to enforcement of right of inspection of books of the corporation, etc.

13. Escondido Mutual Water Co. v. City of Escondido, 169 Cal. 772, 147 Pac. 1172 (where municipal corporation held stock).

in the state complete stock records,¹⁴ and it is provided by section 377 of the Civil Code that all corporations for profit are required to keep a record of all their business transactions, and minutes and records of all their meetings.¹⁵ This code provision requires that

“Such records shall be open to the inspection of any legislative committee, board, commission, or officer of the state of California whose duty it is to inspect or examine the same, and of any director, member or bona fide stockholder thereof; provided, however, the board of directors may, by unanimous vote, deny such examination or inspection to a stockholder who demands the same with intent to use to the injury of the corporation the information to be acquired thereby, and a satisfactory showing of such intent shall be a complete defense to any action or proceeding brought by any such person to compel the officers of any such corporation to submit any of such records for his inspection or examination.”

Section 378 of the Civil Code provides that the stock and transfer book¹⁶ shall also be open to the inspection of any officer, bona fide stockholder, member or creditor of the corporation.

§ 244. Nature and Extent of Right.—At common law a stockholder has the right to inspect the books and records of the corporation,¹⁷ at reasonable times.¹⁸ And the reasons for the rule permitting inspections of corporate books and records¹⁹ applies with equal force to the inspection of corporate property.²⁰ Under the constitutional and code provisions exempting from their requirements religious, educational and benevolent corporations,¹ one who relies

14. See *supra*, § 127.

15. See *supra*, § 129.

16. See *supra*, § 127, as to what the stock records must show.

17. *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781; *Web-*

ster v. Bartlett Estate Co., 35 Cal. App. 283, 169 Pac. 702.

18. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

19. See *infra*, § 245.

20. See *infra*, § 246.

1. See *supra*, § 243.

on this exception in denying the right of inspection is required not only to plead but to prove facts bringing the case within the exception.² While the provisions as to the right of inspection are set forth in the statutes and constitution, and are apparently different in their requirements,³ section 377 of the Civil Code is probably the more comprehensive in its application, as it requires a record of all business transactions, which embraces every act done or ordered to be done. Thus, a list of names and addresses of stockholders prepared by order of the directors and kept by the secretary, although not a record required by law to be kept by the officers of the corporation, is subject to inspection by the stockholders.⁴

§ 245. Reasons for Permitting Inspection.—The reasoning on which the common-law rule that a stockholder has the right to inspect the books of the corporation is founded is that a stockholder has an interest in the company's assets and business and that such inspection may be necessary or proper for the protection of his interest or for his information as to the condition of the corporation and the value of his interests therein. Consequently, he has a right to be informed of the financial condition of the company.⁵ And the statute is founded upon the like principle that shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted and how the capital to which they have contributed is employed and managed.⁶ Since a stockholder who holds stock is liable to pay assessments and is liable to creditors for his proportionate

2. *Gavin v. Pacific Coast etc. Union*, 2 Cal. App. 638, 84 Pac. 270.

3. Const., art. XII, § 14; Civ. Code, § 377, and Civ. Code, § 378. And *supra*, §§ 126-129, 186, 243.

4. *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976.

5. *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781. See *supra*, § 135, as to interest represented by shares.

6. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

share of debts of the corporation, he is reasonably and legitimately entitled to the right of inspection and examination of its books and business.⁷

§ 246. Inspection of Corporate Property.—The rule at common law extends to the corporate property as fully as to the books. There is not, it has been said, a feature of the reasoning applicable to inspection of records that does not apply with equal force to the claim of a right to examine the property of the corporation, especially where it is mining property, the condition and value of which is so easily concealed or misrepresented. The books would often afford no information as to the nature of the property or the manner in which the work is carried on. And so it has been said that it would be a strange rule which would allow a stockholder to examine the books and deny him an inspection of the property in order to verify the statements contained in the books.⁸ It should be noted, however, that as to mining corporations, the statute gives the stockholder the right to examine not only the books but the property, and to be accompanied by an expert,⁹ and a penalty is provided for a denial of such rights.¹⁰ The courts are not disposed to measure demands for inspection of mining property by the refined and technical

7. *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702.

8. *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781. See note, 1 Cal. Law Rev., p. 268.

9. Civ. Code, §§ 588, 589; *Hobbs v. Davis*, 168 Cal. 556, 143 Pac. 733; *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781.

10. Civ. Code, § 589; *Symmes v. Sierra Nev. Min. Co.*, 171 Cal. 427, 153 Pac. 710 holding that the privileges of taking of samples is in-

cluded in the right, and that a denial of that privilege is within the penalty provisions. In the *Symmes* case, supra, the order for inspection of the mine was made in California—the corporation being organized under the laws of that state and its principal place of business being therein—but the right of inspection was denied in the state of Nevada, where the mine was located: It was held that the statutory penalty could be imposed and enforced in California. See note in vol. 4, Cal. Law Rev., p. 239.

tests applicable to pleadings. And so it has been held in an action to recover the penalty that an allegation of damage is not necessary; it is sufficient if it appears that there is a failure or refusal to comply with the statutory requirement following a request for inspection.¹¹

§ 247. **Motive or Purpose.**—At common law, a writ to enforce the right to inspect the books and records would not issue as a matter of course, or to gratify a mere idle curiosity, but it was necessary for the petitioner to show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination was desired.¹² But the rule in California—conforming to the great weight of American authority—is to the effect that where the right is statutory, and is not otherwise conditioned or restricted, it is not necessary for the petitioner to aver or show the purposes or object of the inspection;¹³ and so, prior to the amendment to section 377 of the Civil Code in 1917, it was held that the clear legal right given by the constitution and the statute could not be defeated by stopping to inquire into motives, or by showing that the stockholder intended to use the information to the corporation's injury;¹⁴ nor was it necessary to show any reason or occasion for making the examination.¹⁵ Section 377 as amended, however, permits the denial of the right of

11. *Kinard v. Ward*, 21 Cal. App. 85, 130 Pac. 1196 (holding that no special standard of sufficiency was required of an application for an order to permit inspection).

12. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

13. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702.

14. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

1050; *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702; *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976. If, however, the "clear legal right" is given by the constitution without reference to motives of the stockholder desiring inspection, as indicated by the cases cited, the amendment of 1917 to Civil Code, section 377, cannot curtail the right.

15. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

inspection by the unanimous vote of the board of directors, where it is demanded with the intent to use to the injury of the corporation the information to be acquired thereby.¹⁶ But of course the amendment has no bearing on a case arising before the amendment.¹⁷

§ 248. Who may Exercise Right.—The creditors of an individual stockholder have no right of access to the books of the corporation, and the books, therefore, are not notice to them of their contents, the right to inspect being limited to stockholders and corporation creditors.¹⁸ Where one has established a status as stockholder, the corporation cannot impose upon him a condition having reference to another matter, as, for instance, that he admit that he is a director and make his demand as such director. Sections 377 and 378 of the Civil Code restrict the right to bona fide stockholders. But one may be a bona fide stockholder without having any beneficial interest in the shares. Thus, a stockholder who holds stock merely to qualify as a director is a bona fide stockholder, and has a right to inspect corporate records as such.¹⁹ The language of the constitutional provision is general in its character, giving the right of inspection to "every person having an interest" in the corporation.²⁰

§ 249. Enforcement of Right.—The right to inspect corporate records may be enforced by writ of mandate,¹

16. Civ. Code, § 377, as amended by Stats. 1917, c. 730.

17. *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702.

18. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676 (stock books).

19. *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702.

See *infra*, § 288, as to who are bona fide stockholders.

20. Const., art. XII, § 14. See *infra*, § 288, as to restriction to bona fide stockholders when constitution gives right without restriction.

1. *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781; *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St.

even though the corporation is a foreign one, and its property is situated in a foreign state, if, as a matter of fact, it has its principal place of business in California and all of its directors reside in the state.² The remedy by mandamus is the appropriate remedy, since an action at law for damages is not a plain, speedy or adequate remedy. Besides, the very information sought by the stockholder and withheld from him by the corporation might be the basis of the action for damages. The law, therefore, does not contemplate that the right to an inspection shall be defeated by showing that the stockholder could maintain an action for damages.³ The natural persons to be named as defendants are those composing the board of directors, and including the president and secretary.⁴

It is provided by the code that an officer who has corporate records in his custody or control and who refuses to give a stockholder, lawfully demanding during office hours to inspect or take a copy of same, a reasonable opportunity to do so, is guilty of a misdemeanor.⁵ Denial of the right to inspect under the command of a writ may, moreover, be punished as a contempt,⁶ provided, however, it is not beyond the power of the officer to whom the writ is issued to comply therewith.⁷ In any event, the denial

Rep. 156, 67 Pac. 1050; Webster v. Bartlett Estate Co., 35 Cal. App. 283, 169 Pac. 702; Poor v. Yarnell, 28 Cal. App. 714, 153 Pac. 976.

Under the code the showing of the intent of the stockholder is plainly declared to be a defense; Civ. Code, § 377. See *supra*, § 247.

2. Hobbs v. Tom Reed Gold Min. Co., 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781.

3. Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050. See, also, Hobbs v. Tom Reed Gold Min. Co., 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac.

781, where it was conceded that no plain, speedy and adequate remedy existed in the ordinary course of law. See MANDAMUS.

4. Hobbs v. Tom Reed Gold Min. Co., 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781.

5. Pen. Code, § 565.

6. See CONTEMPT, vol. 5, p. 913, as to contempts for disobedience generally of writs, orders, etc.

7. Egilbert v. Superior Court, 6 Cal. App. 190, 91 Pac. 748. See Bauter v. Superior Court, 6 Cal. App. 195, 91 Pac. 749, holding that the successor in office cannot be

by officers of the right of a stockholder to inspect books and records is not ground for dissolution of the corporation.⁸

Ratification of Real Property Transactions.

§ 250. **In General.**—The assent of stockholders is not, as a rule, essential to the sale of real property of a corporation, and the general presumption of the power of the corporation to buy and sell real property prevails,⁹ unless the statute requires the consent of stockholders.¹⁰ In the case of certain kinds of corporations, statutes of this character have, however, been enacted. Thus, the act of 1880 relating to mining corporations provided that it should not be lawful for the directors to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground owned or held by the corporation, nor to purchase or obtain in any way any additional mining ground, unless the transaction were ratified by the holders of at least two-thirds of the capital stock of such corporation.¹¹ Where the property was shown to be mining ground, title did not pass where there was no evidence to prove the deed was ratified as required by the statute.¹² But being an exception to the general rule, one who objects to the

punished for contempt of the order where he was not a party to the proceedings.

8. *Burham v. San Francisco etc. Mfg. Co.*, 76 Cal. 24, 17 Pac. 940.

9. *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269.

10. *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269. See *infra*, § 574, as to requirement of consent of stockholders in a transfer of the property of the corporation as a whole.

11. *Stats.* 1880, p. 131 (see *Stats.* 1905, p. 74, for repeal of act). See *infra*, § 251, as to essentials

and effect of the act; and *infra*, § 252, as to attacking validity of transaction.

This act was held applicable to foreign corporations holding mining property in California; *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27 (where it was conceded to be applicable); *Williams v. Gaylord*, 186 U. S. 157, 46 L. Ed. 1102, 22 Sup. Ct. Rep. 798, see, also, *Rose's U. S. Notes*.

12. See *infra*, § 252.

validity of a conveyance under such an act must show that the case comes within the exception or the conveyance will be deemed valid. Thus, under the act of 1880, it was necessary to show that the property was mining ground.¹³ It has been held that since the act touched only the power or authority of the directors, it could not be construed to relate merely to their personal liability, for no penalty is imposed upon them for its violation.¹⁴

§ 251. Essentials and Effect.—Under the act of 1880, relating to mining corporations, the stockholders were made a component part of the power to make the transaction effective;¹⁵ and this was held to be the rule, although they could not by any act of their own make a mortgage or validate one not previously authorized and executed by the board of directors.¹⁶ The act of 1880 did not require evidence of the ratification to be attached to the mortgage; but the ratification became complete upon the adoption of the resolution by the stockholders. The provision in the statute for attaching the secretary's certificate was merely for the convenience of proof.¹⁷ The earlier cases showed a disposition to give a very strict interpretation to the provisions of the law,¹⁸ but this

13. *Johnson v. California Lustral Co.*, 127 Cal. 283, 59 Pac. 595; *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269.

14. *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178.

15. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Curtin v. Salmon River etc. Ditch Co.*, 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851; *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552. See, also, *supra*, § 250, as to act of 1880 above referred to.

16. *Curtin v. Salmon River etc. Ditch Co.*, 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851; *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373 (holding that the provision of the act did not dispense with action by the board, but required the additional consent of the stockholders).

17. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

18. See statement of rule in *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, which was declared in

strictness was relaxed in later decisions and it was held that ratification was not required in the manner or form prescribed by the act,¹⁹ but might have been given by the previous consent or direction of stockholders holding two-thirds of the stock, although purporting to be made in their capacity as directors.²⁰ Construing the act it was held that the consent of stockholders could not be presumed from the fact of a conveyance, whether under the corporate seal or not, for such consent or ratification might follow the execution of the deed, and hence was not necessarily or presumptively involved in its execution.¹ If the transaction was not in fact assented to by the requisite number of stockholders, the doctrine of estoppel could not give the instrument validity; and although there might have been circumstances under which stockholders could be held estopped, an estoppel could not be predicated upon the acts of the corporation or directors alone.² And where the transaction was void against the corporation itself, it was held that there was no estoppel to dispute its validity against a creditor during the time it remained invalid as against the corporation.³ But where the instrument has been treated as valid after the repeal of the statute, under principles of estoppel the corporation cannot assert the invalidity of an act regular on its face.⁴

Royal Consol. Min. Co. v. Royal Consol. Mines Co., 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123, not to be a correct statement of the law in view of the decision in Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30.

19. Standard Oil Co. v. Slye, 164 Cal. 435, 129 Pac. 589; Royal Consol. Min. Co. v. Royal Consol. Mines Co., 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123.

20. Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30. See Royal Consol. Min. Co. v. Royal Consol. Mines Co., 157

Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123, commenting on Lacy v. Gunn, *supra*.

1. McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Bennett v. Red Cloud Min. Co., 14 Cal. App. 728, 113 Pac. 119.

2. Royal Consol. Min. Co. v. Royal Consol. Mines Co., 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123.

3. Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30.

4. Standard Oil Co. v. Slye, 164 Cal. 435, 129 Pac. 589.

§ 252. **Attacking Validity of Transaction.**—Under the act of 1880 relating to mining corporations, the transaction, if unauthorized or unratified by the stockholders, was void;⁵ and title to the property did not pass.⁶ The title of the act indicates that it was intended for the benefit of the stockholders alone, who would be accorded the right, at their option, to avoid the transactions. However, the authorities support the right of anyone who connected himself with the title to the property or showed himself possessed of an interest therein by virtue of a mortgage or other lien to raise the question of want of ratification.⁷ For example, the holders of subsequent liens could bring suit to have the transaction avoided for noncompliance with the statute.⁸ It has been held that where the property was conveyed to a corporation which undertook to pay the mortgage indebtedness, the corporation was estopped to deny the validity of the mortgage, even though

5. *Standard Oil Co. v. Slye*, 164 Cal. 435, 129 Pac. 589 (lease, but where the statute had been repealed); *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123 (mortgage); *Galbraith v. Shasta Iron Co.*, 143 Cal. 94, 76 Pac. 901 (deed); *Hudepohl v. Liberty Hill Consol. Min. & W. Co.*, 80 Cal. 553, 22 Pac. 339 (where instrument was held not to be a lease). See also *supra*, §§ 250, 251, as to act of 1880 above referred to.

6. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Pekin Mining etc. Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679; *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178; *Bennett v. Red Cloud Min. Co.*, 14 Cal. App. 728, 113 Pac. 119 (holding that a prior mortgagee, who did not show that his mortgage had been properly

ratified, failed to show that he has an interest, and was in the position of a stranger to the transaction). See *Greve v. Echo Oil Co.*, 8 Cal. App. 275, 96 Pac. 904, holding that ratification by the stockholders of the grantee corporation was necessary only where it was a purchase of additional mining ground.

7. *Bennett v. Red Cloud Min. Co.*, 14 Cal. App. 728, 113 Pac. 119. See *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30, and *Galbraith v. Shasta Iron Co.*, 143 Cal. 94, 76 Pac. 901, as to who were under the protection of the act. And see *infra*, § 286 et seq., as to who may vote at a stockholders' meeting.

8. *Williams v. Gold Hill Min. Co.*, 96 Fed. 454.

it had not been ratified by the stockholders of the mortgagor.⁹

Right to Dividends.

§ 253. **In General.**—The right of stockholders to declared dividends is a substantial right, inhering in the shares of stock.¹⁰ But while the payment of dividends affects the value of corporate stock, it by no means follows that such stock has no value because of failure to declare dividends thereon.¹¹ Agreements are often made to guarantee dividends of a certain amount,¹² and such an agreement by a corporation is not ultra vires. Where the undertaking is to make good any deficiency in dividends below a certain per cent per annum over a period of time, liability does not accrue until the termination of the agreement, because deficiencies cannot sooner be determined. After dividends have been declared, they become a personal debt from the corporation to the stockholder.¹³ A bona fide stockholder has the right to dispose of his dividend, and the fact that there is no authority on file does not necessarily or inferentially imply that no such authority was given. Authority to draw dividends may be subsequently filed or the act ratified.¹⁴

9. *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27.

10. *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530 (holding that before a court can seriously invade such right by prohibiting all payments of dividends, all stockholders should be represented in the action); *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301. See notes, 6 A. L. R. 802 and 13 A. L. R. 426, as to rights of holders of preferred stock in respect to dividends.

11. *Glindeemann v. Ehrenpfort*, 29 Cal. App. 87, 154 Pac. 481; *Wegerer v. Jordan*, 10 Cal. App. 362, 101 Pac. 1066.

12. As to individual guaranties, see *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273; *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303; *Davidson v. Roffy*, 28 Cal. App. Dec. 525, 180 Pac. 830; *McC Campbell v. Obear*, 27 Cal. App. 97, 148 Pac. 942. See, as to preferred stock, *supra*, § 142.

13. *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580; *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43; *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301.

14. *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

§ 254. **Dividends from Profits.**—The payment of dividends other than from surplus profits arising from the business is expressly prohibited by statute.¹⁵ “Surplus profits” has been defined as the excess of receipts over expenditure, that is, net earnings or net receipts—in other words, receipts of a business, deducting current expenses.¹⁶ When all liabilities are paid either out of the gross receipts or net earnings, the remainder is the profit of the shareholders.¹⁷ Under these definitions, profits or surplus profits cannot consist of earnings never yet received; and without receipts there cannot be said to be profits. Money earned as interest, therefore, however well secured or certain to be paid eventually, cannot be distributed as dividends to stockholders, and does not constitute surplus profits. To hold otherwise, it has been said, would tend to open the door to a practice under which the assets of corporations would be liable to distribution as dividends, upon no surer basis than the judgment of their directors as to the value of their bills receivable.¹⁸ Likewise, a mere advance or mere estimate of increase in value of property prior to its sale, or estimated profits on partially executed contracts, do not constitute profits.¹⁹ In determining profits from which dividends may be paid, it is not necessary to pay the whole of debts owing by the corporation, although accruing interest must be paid and provision made for gradual extinction of the principal, and for needed improvements.²⁰ And where the purpose for

15. Civ. Code, § 309; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365. And see cases cited *infra*, this section, and *infra*, §§ 255–260.

16. *People v. San Francisco Savings Union*, 72 Cal. 199, 13 Pac. 498; *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

17. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

18. *People v. San Francisco Savings Union*, 72 Cal. 199, 13 Pac. 498; *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

19. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

20. *Excelsior Water & M. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44. See *infra*, § 256, as to discretion of directors in such matters.

which the corporation is formed is the liquidation or distribution of an estate consisting of property, the corporation is not within the prohibition against payment of dividends other than from surplus profits of the business.¹ If money obtained from an increase in value of land cannot be considered and divided as profits of the business in which the corporation is engaged, there can be no profits for the stockholders where the sale of land is the sole business; but where the sole purpose of the corporation is to market land at an advance, the increase in value is profits. Where, however, the land is acquired for the purpose of farming, leasing or developing mineral deposits, and the like, the stockholders look to the income thus produced for their profits and any increase in the market value of the land is an increase in capital investment.²

§ 255. Dividends of Mining Corporation.—A mining corporation, like any other corporation organized for the purpose of utilizing a wasting property—a property that can be used only by consuming it—as a mine, a lease, or a patent—is not deemed to have divided its capital merely because it has distributed the net proceeds of its operations, although the necessary result is that so much has been subtracted from the substance of the estate. It may distribute its net earnings, although the value of the mine is thereby diminished; but it may not sell the mine, or any part of it and distribute the proceeds. If free from debt, the surplus profits of such corporation are ascertained by deducting gross outlay from the gross receipts, and the balance, less a reasonable reserve to meet contingencies, is the legitimate subject of a dividend. But if subject to debt, or when the incurring of debt is necessary for improvements, it is not necessary to pay the whole of such debts, but a sinking fund must be provided sufficient to extinguish the principal before the mine is exhausted. If a share of the

1. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030.

2. *Estate of Gartenlaub*, 61 Cal. Dec. 415, 197 Pac. 90, per Sloane, J.

net earnings satisfactory to the creditors and reasonably proportioned to the amount of indebtedness, the extent and permanence of the mine, or the rate at which it is being exhausted, has been fairly and honestly applied toward the debts, the remainder may properly be paid out in dividends, because it may be justly regarded as surplus profits of the business.³

§ 256. Discretion of Directors as to Dividends.—Apportionment of net earnings to the payment of cash dividends,⁴ and acts pertaining to stock dividends, increase of capital, reserve or contingent fund, or to providing for future obligations,⁵ are largely matters of policy entrusted to the discretion of the directors, which, when honestly and intelligently exercised, will not be lightly overruled.⁶ Thus, where a majority of the stock is held in pledge and the right so to hold the stock is in litigation, it is entirely proper for the directors not to declare any dividends, but to hold the assets awaiting the result of the litigation.⁷ But the discretion of directors in this respect is not an arbitrary one and must be exercised fairly and honestly; and when it appears that the proceedings are unfair, that the officers are acting wantonly and in bad faith, or in disregard of the rights of members, the courts will intervene. The good faith of directors in acting upon reports of subordinates in determining whether there are surplus profits is not a defense in an action upon their statutory liability.⁸

3. *Excelsior Water etc. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44, per Beatty, G. J. See MINES.

4. *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

5. *Excelsior Water etc. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Mulcahy v. Hibernia Savings etc. Society*, 144 Cal. 219, 77 Pac. 910 (action to compel distribution of reserve fund as dividends).

6. *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *Excelsior Water etc. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44.

7. *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

8. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

§ 257. Stock Dividends.—When a share of stock is issued, it represents a pro rata interest in all the property of the corporation, and a board of directors cannot declare it to be representative of any particular part of the corporate assets. When, therefore, directors declare a stock dividend out of surplus earnings, they mean only that they increase the outstanding stock of the corporation to correspond with an equal amount of increase in the corporate assets, and the stock when issued is not limited in its value to such increased amount of assets, but derives its value from the entire assets of the corporation. No form of declaring the dividend can alter this fact.⁹ Upon the declaration of a stock dividend, since a stockholder by virtue of his stock has an interest in the undivided profits, he is not entitled to recover his share of the dividend of stock and also a share of the undivided profits which the stock represents. The dividend cannot be recovered in money and in stock also.¹⁰

§ 258. Persons Entitled in General.—The plaintiff in an action to recover dividends is bound to show that he was the owner of stock at the time of accrual of the dividends. He cannot rely upon mere possession, as he might in trespass or trover, against anyone except the true owner; nor can he rest upon proof of any special property in the stock that falls short of legal title, for the corporation is not bound to account for dividends to anyone other than the holder of the legal title.¹¹ Dividends are due to the true owners of the shares.¹² Thus in paying dividends to the record holders of stock, the ownership of which is in litigation, the corporation decides that such

9. Estate of Duffill, 180 Cal. 748, 183 Pac. 337, Melvin, J.

10. Harris v. San Francisco Sugar etc. Co., 41 Cal. 393.

11. Dow v. Gould etc. Min. Co., 31 Cal. 629.

12. MacDermot v. Hayes, 175 Cal. 95, 170 Pac. 616; Cates v. Consolidated Realty Co., 25 Cal. App. 531, 144 Pac. 301. See Civ. Code, § 325, as to dividends payable to stock standing in the name of a married woman.

holders are the true owners and that the adverse claimants have no interest therein; and the corporation makes such decision at its peril.¹³ The proposition that an action for dividends can be maintained only by the party appearing to be the owner on the books of the company, and cannot be maintained on a merely equitable title, cannot be sustained in California, where, by express provision of the law, stock is transferred "as to the parties thereto" by simple indorsement and delivery, although the rule is different where, by express provisions of the law, stock is made "transferable only on the books of the company." Ordinarily, the rule that a transfer by simple indorsement is valid as between the parties goes no further than to protect the corporation in paying dividends to a recorded stockholder, in the absence of notice of transfer or other right.¹⁴ But where one ceases to be owner, even though by conversion of his stock by the corporation, the amount of dividends declared subsequently upon the stock cannot be included in the damages for the conversion,¹⁵ except where the action is prosecuted with reasonable diligence after the conversion and the highest market value at any time between the conversion and the verdict may include the amount of such dividends and such market value is claimed in the action.¹⁶ The proper procedure for the corporation in case of doubt or notice of conflicting claims is to interplead the contesting parties.¹⁷ It has been held that the evidence of title shown

13. *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616.

14. *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494 (holding that executor of estate might recover dividends from corporation, although assignment had been made under a decree of distribution, which was subsequently reversed).

15. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476 (entitled only to recover value of stock at

time of conversion, plus interest; not value of stock plus dividends).

16. See Civ. Code, § 3336, subd. 1, and *supra*, § 146, as to market value as measure of damages.

17. *Cross v. Eureka Lake etc. Co.*, 73 Cal. 302, 2 Am. St. Rep. 808, 14 Pac. 885 (under Code Civ. Proc., § 386). See *Savings Union Bank etc. Co. v. Crowley*, 176 Cal. 543, 169 Pac. 67 (by stipulation). See INTERPLEADER.

upon the face of a certificate of stock standing in the name of an officer of a corporation is not conclusively affected by the payment of dividends thereon to the corporation.¹⁸

§ 259. Rights of Pledgor and Pledgee.—A pledgee of stock carries with it a pledge of the dividends,¹⁹ since the increase of property pledged is pledged with the property.²⁰ The lawful pledgee of stock may therefore collect the dividends,¹ and apply them in satisfaction of the debt. The dividend after it is declared is the property of the owner, the same as the stock,² and inures entirely to his benefit, and operates as payment of his debt when collected by the pledgee.³ But failure on the part of the pledgee to collect a dividend does not cast upon him the duty to credit it upon the obligation, even though it would practically liquidate it.⁴ No duty rests on him to make inquiry as to the declaration of dividends, for he may be entirely content with the security afforded by the shares without regard to the dividends.⁵ After payment of the debt for which the stock is pledged the pledgee has no right to the dividends under the pledge.⁶ But until the debt is first satisfied, it has been held that a pledgee in possession of the stock cannot be disturbed in his right;⁷

18. *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071.

19. *Savings Union Bank etc. Co. v. Crowley*, 176 Cal. 543, 169 Pac. 67; *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778.

20. Civ. Code, § 2989. See PLEDGE.

1. *Savings Union Bank etc. Co. v. Crowley*, 176 Cal. 543, 169 Pac. 67.

2. *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778.

3. *Gilfellan v. Gilfellan*, 168 Cal. 23, Ann. Cas. 1915D, 784, 141 Pac. 623. See *Smith v. Forty-nine & 56 Quartz Min. Co.*, 14 Cal. 242, holding that where the pledgor claims that the pledgee has re-

ceived from dividends more than enough to pay the debt, a court of equity is the proper forum to decree an account, to prevent a transfer of the stock by the pledgee and to direct a reconveyance.

4. *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778.

5. *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271.

6. *Cross v. Eureka Lake etc. Co.*, 73 Cal. 302, 2 Am. St. Rep. 808, 14 Pac. 885.

7. *Savings Union Bank etc. Co. v. Crowley*, 176 Cal. 543, 169 Pac. 67 (where pledgor died and no

and he may collect the dividends on the stock. The owner, in order to recover from the pledgee must show that the latter had no right to collect the dividends.⁸

§ 260. Rights of Purchasers or Creditors.—A purchaser of stock is not legally entitled to dividends thereon, in the absence of any agreement to that effect, until the legal title has passed to him.⁹ Assignment of stock does not, however, include any interest in past dividends, which, when declared, become debts from the corporation to the owners. A mere assignment of the stock does not carry with it the right of action on such debts.¹⁰ When the assignee claims dividends, one who has collected them, even as pledgee, may resist the action until a full and complete right to the money has been established.¹¹ But where stock has been attached, the right to dividends between the date of the attachment and the time of the execution sale, passes with the stock to the execution sale purchaser, since profits and dividends to accrue are impounded equally with the stock itself.¹² But the right of the purchasers at the sale to declared dividends remains separate from the stock itself.¹³ Ownership by vendees or transferees of stock under an agreement of sale is not negatived by a provision that they shall be absolute owners of dividends accruing thereon. Such provision, it

claim was presented against his estate by pledgee); *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

8. *Savings Union Bank etc. Co. v. Crowley*, 176 Cal. 543, 169 Pac. 67.

9. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915D, 784, 141 Pac. 623 (holding that where the purchaser was also a codebtor of the owner that dividends paid to the pledgee did not operate to pay the purchaser's share of the debt, title to the stock not having passed under the contract of purchase).

10. *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301 (assignee of purchaser at execution sale).

11. *Cross v. Eureka Lake etc. Co.*, 73 Cal. 302, 2 Am. St. Rep. 808, 14 Pac. 885.

12. *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301; *McCarthy Co. v. Boothe*, 2 Cal. App. 170, 83 Pac. 175.

13. *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301.

has been said, is for the purpose of giving them beyond question the right to dividends, especially where the stock is to be held as collateral security by the vendor.¹⁴ It has been held that where stock is assigned by the owner, together with all dividends made after a certain time, parol evidence is admissible to explain the transaction and to show that an expected dividend was intended to be reserved to the assignor, even though such dividend was not in fact declared until after the time specified.¹⁵

§ 261. Rights of Life Tenant and Remainderman.—According to the prevailing American rule which has been adopted in California, where corporate stock forms part of a trust estate the income of which is to be paid to one for life with remainder to another, the remainderman is entitled to the value of the stock as it existed at the date of the creation of the trust, and the accumulations beyond that date are distributable to the life tenant as income or profits.¹⁶ The life tenant of corporate stock is entitled to the undiminished benefit of its net earnings in any and every contingency; less than that would not allow him the full use of the life estate.¹⁷ And the court will ascertain whether the giving of a stock dividend or a money dividend to the life tenant reduces the value of the corpus of the estate as it existed at the time of the creation of the trust and the intrinsic value as shown by the books of the corporation is to be taken into consideration in establishing what the remainder is entitled to have preserved for

14. *Commercial & Savings Bank of San Jose v. Pott*, 150 Cal. 358, 89 Pac. 431.

15. *Brewster v. Lathrop*, 15 Cal. 21 (where the dividend was declared less than an hour after the time specified in the assignment).

16. *Estate of Gartenlaub*, 61 Cal. Dec. 415, 197 Pac. 90 (citing authorities from other jurisdictions

to this rule); *Estate of Duffill*, 180 Cal. 748, 183 Pac. 337.

The Massachusetts rule, prevailing in a few states, is that cash dividends belong to the tenant for life and stock dividends to the corpus; *Estate of Duffill*, 180 Cal. 748, 183 Pac. 337.

17. *Estate of Duffill*, 180 Cal. 748, 183 Pac. 337.

ultimate distribution to him.¹⁸ Where the business of the corporation is the marketing of lands at an advance in price, dividends from increasing values go to the life tenant; but where the land is purchased for the purpose of farming, or leasing, or developing it for the purpose of income therefrom, dividends resulting from increased values belong to the remainderman as an increase in the capital investment.¹⁹

§ 262. Action to Recover Dividend.—Although there is a conflict of authority upon the point in other jurisdictions, it is the rule in California that a demand by the owner of stock for declared dividends is necessary before a right of action therefor exists. And the statute of limitations does not begin to run until demand is made therefor.²⁰ In this connection it has been said: "A stockholder . . . cannot defeat the policy of the statute by unreasonable delay in making his demand. . . . As to what is a reasonable time, that is ordinarily determined by analogy to the statutory periods of limitation." Hence it has been held that where the action is a simple one at law to recover declared dividends and is barred in two years, the demand must be made within two years after the right to make it accrues, or a valid excuse must be shown for the failure to make it within that time.¹ But the stockholder is not required to make a demand unless he knows or has good reason to believe that dividends

18. *Estate of Gartenlaub*, 61 Cal. Dec. 415, 197 Pac. 90; *Estate of Duffill*, 180 Cal. 748, 183 Pac. 337 (holding that the mere adoption of a resolution by the directors of the corporation cannot change accumulated earnings into capital as between the life tenant and the remainderman).

19. *Estate of Gartenlaub*, 61 Cal. Dec. 415, 197 Pac. 90.

20. *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43. See *infra*, § 262, as to parties in an action to recover dividends.

1. *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43 (concurring opinion of Beatty, C. J.). See **LIMITATION OF ACTIONS.**

have been declared.² No particular form of demand is necessary. Thus, it has been held that an inquiry by an administratrix of a stockholder's estate as to dividends on the stock and information by the corporation that there is no money due or owing on account of dividends is a clear refusal of a request for payment of dividends and a denial of any liability of the corporation thereon, the corporation thereby putting itself in a state of hostility to the person entitled with respect to any alleged obligation in the matter of dividends.³

Suit by Stockholder on Behalf of Corporation.

§ 263. **In General.**—Under the rule that the stockholders have no title to the corporate property,⁴ if it is conveyed by the corporation under fraudulent inducements the stockholders cannot maintain an action directly for its reconveyance.⁵ So long as the corporation is willing to perform its duty toward stockholders by instituting and conducting in good faith the necessary legal proceedings, stockholders have no cause to complain,⁶ for with the right of the corporation to sue and be sued concerning

2. *MacDermot v. Hayes*, 175 Cal. 95, 170 Pac. 616.

3. *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43.

But see the dissenting opinion of Justice Garoutte in *Bills v. Silver King Min. Co.*, supra, in which it is said: "If a stockholder had called at the office of the corporation and inquired if a dividend had been declared, and the corporation had falsely replied in the negative, a parallel case to the one at bar would be presented. . . . If Mrs. R. [the administratrix] had treated these conversations as constituting a demand and refusal and had brought an action for the dividends

against the corporation, relying upon such demand and refusal, the corporation's conduct would have been such, that very probably upon a plea by it of no demand and refusal, the court would have held against it. But the converse of the proposition, as presented in this case, by no means follows, for the corporation by its conduct was tarnished with deceit and dishonesty [as must be admitted upon the state of the case], and no such taint was upon her."

4. See supra, § 267.

5. *Gorham v. Gilson*, 28 Cal. 479.

6. *Cogswell v. Bull*, 39 Cal. 320.

corporate rights or liabilities the stockholders cannot interfere, except when the directors refuse to act or are guilty of fraud in the maintenance or defense of an action.⁷ Where circumstances are such, however, that a stockholder is entitled to sue on behalf of the corporation the action is instituted and prosecuted for the direct and immediate benefit of the corporation and only for the incidental benefit of the stockholders.⁸

§ 264. Cases in Which Relief may be Given.—A stockholder may maintain a suit in a court of equity in his own name, where there exists as a foundation of the suit some action or threatened action of the board of directors or trustees which is beyond the authority conferred on them by the charter of the corporation.⁹ Even the majority of the directors have no right to direct the affairs of a corporation except in accordance with the provisions of its charter, and every individual stockholder has the right to stand upon his contract and forbid any departure from

7. *Gosewisch v. Doran*, 161 Cal. 511, Ann. Cas. 1913D, 442, 119 Pac. 656 (holding that under the exception to the general rule any stockholder may bring an action to enforce a claim of the corporation against one who is in control of the board of directors and who can thus prevent an action in the name of the corporation itself); *Waymire v. San Francisco etc. Ry. Co.*, 112 Cal. 646, 44 Pac. 1086; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Cogswell v. Bull*, 39 Cal. 320; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Consolidated Concessions Co. v. McConnell*, 40 Cal. App. 443, 180 Pac. 842; *Moyle v. Landers*, 3 Cal. Unrep. 113, 21 Pac. 1133. See *infra*, § 267, as to necessity for

prior demand for action upon the corporation.

8. *Waymire v. San Francisco etc. Ry. Co.*, 112 Cal. 646, 44 Pac. 1086; *Beach v. Cooper*, 72 Cal. 99, 13 Pac. 161 (holding that it is the theory of such action that the legal agents of the corporation being disqualified or refusing the stockholders may assert their rights through an action in behalf of the corporation). See *infra*, § 265.

9. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, see, also, *Rose's U. S. Notes*. See *Baker v. Ducker*, 79 Cal. 365, 21 Pac. 764, action by members of a religious association to prevent change of corporate purposes, i. e., change from one denomination to another.

its terms.¹⁰ And courts of equity will, at the instance of a stockholder, control a corporation and its officers and restrain them from doing acts even within the scope of corporate authority if such acts, when done, would, under the particular circumstances, amount to a breach of the very trust upon which the authority itself has been conferred; and upon the same principle equity will, even after such an act has been done, relieve an injured stockholder from loss, if in the meantime, no superior equity has intervened, nor the rights of innocent third parties attached.¹¹ Accordingly, relief may be given for a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders, such as will result in serious injury to the corporation or the interest of other shareholders.¹²

§ 265. Corporate Causes of Action.—In its essence, a suit by a stockholder, as such, is brought by the corporation to redress a legal wrong which the corporation itself has suffered;¹³ and the essential character of the corporate cause of action remains the same.¹⁴ The stockholder

10. *Ashton v. Dashaway Assn.*, 84 Cal. 61, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091.

11. *Wright v. Oroville Gold Min. Co.*, 40 Cal. 20.

12. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, see, also, *Rose's U. S. Notes* (case arising in California); *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1982 (moneys improperly expended by directors); *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111; *Ashton v. Dashaway Assn.*, 84 Cal. 61, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091; *James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117;

Cuneo v. Giannini, 40 Cal. App. 348, 180 Pac. 633.

13. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272; *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 Pac. 704 (the gravamen of the charge is the injury to the corporation by reason of the wrongful acts of the defendants); *Dial v. Homestead Land etc. Co.*, 39 Cal. App. 479, 179 Pac. 444; *James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117.

14. *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 Pac. 704 (holding that a legal right of action will not be treated as equitable

stands in the shoes of the corporation defendant; his wrongs are the corporation's wrongs and he can have no other. He is a mere nominal plaintiff and the corporation is the real party in interest, any judgment recovered inuring to its benefit. Hence, if the corporation is not in a position to attack a transaction, the stockholder cannot,¹⁵ and whatever would have estopped the corporation from recovering is equally a defense against the stockholder.¹⁶ His recovery can be no other than that which the corporation itself might obtain were the cause prosecuted by its own officers.¹⁷ Where the action is one for rescission, clearly it is not possible for the plaintiff stockholder, who is acting in a representative capacity on behalf of the corporation, to place, or offer to place, the other party in the position he occupied at the time the transaction was consummated; hence it is not necessary for the complaining stockholder to place the other party in statu quo as a condition precedent to the suit.¹⁸ For like reason, the doctrine that failure to rescind or offer to rescind is ratification, does not apply.¹⁹ However, the plaintiff cannot seek equity for the benefit of the corporation while wholly failing to do equity or requiring the corporation to do equity.²⁰

If there be no corporate cause of action, it will not matter how just and how grievous may be the complaint of the individual stockholder, nor how complete the proof

merely because the stockholder brought in equity a suit to enforce it on behalf of the corporation).

15. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272; *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

16. *Wickersham v. Crittenden*, 110 Cal. 332, 42 Pac. 893; *Shively v. Eureka etc. Min. Co.*, 5 Cal. App. 236, 89 Pac. 1073.

17. *Willis v. Porter*, 132 Cal. 516,

64 Pac. 896; S. C., 6 Cal. Unrep. 492, 61 Pac. 1109.

18. *Wills v. Porter*, 132 Cal. 516, 64 Pac. 896; *Holt v. California Dev. Co.*, 161 Fed. 3, 88 C. C. A. 167.

19. *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710 (dissenting opinion of Beatty, C. J.).

20. *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838. See *Freeman v. Glenn County Tel. Co.*, 184 Cal. 508, 194 Pac. 705, on rehearing in supreme court.

of his personal loss, damage or injury; in an action on behalf of the corporation in such case, no recovery can be had; the stockholder must proceed by his individual action to obtain a personal recovery.¹

§ 266. Stockholder as Trustee for Purposes of Suit.—

A stockholder who institutes an action on behalf of the corporation sues purely as a trustee to redress corporate injuries.² He is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court.³ He acts in a purely representative capacity, empowered to do precisely what a guardian ad litem appointed by the court might do. Thus, the court and not the stockholder has power to compromise the suit under the proper circumstances.⁴ While for the purposes of the suit the stockholder represents the corporation, it is plain that the plaintiff and defendants continue to be the real adverse parties.⁵ Although not prosecuting in his own right and for his own benefit, the stockholder is unquestionably entitled to conduct, manage and control the litigation until a final determination thereof, after which, in the case of a corporation not under disability and where no good reason appears to the court why it should not be allowed to take into possession and dispose of the judgment recovered, it becomes the duty of the stockholder to restore the funds in his possession to the corporation.⁶

1. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272 (dictum as to the effect of a sale of stock between individuals under false representation that it is treasury stock); *Beal v. United Properties Co.*, 31 Cal. App. Dec. 656, 189 Pac. 346; *James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117 (purchase of stock under false representations, where corporation is not damaged by the purchase).

2. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312; *James v. P. B.*

Steifer Min. Co., 35 Cal. App. 778, 171 Pac. 117. And see cases cited *supra*, § 265.

3. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341.

4. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

5. *Beach v. Cooper*, 72 Cal. 99, 13 Pac. 161.

6. *Chetwood v. California Nat. Bank*, 113 Cal. 649, 45 Pac. 854;

The stockholder is not entitled to secure the amount of the judgment himself,⁷ but clearly he is entitled to an allowance for reasonable costs and expenses of litigation,⁸ including reasonable counsel fees.⁹

§ 267. Demand on Corporation and Refusal.—A member or stockholder cannot have redress for any wrong or injury to the corporation until he has exhausted all the means within his reach to obtain redress from the managing body of the corporation,¹⁰ and the corporation itself has failed, after proper application to it, to bring suit.¹¹ Where the corporate officers fail to comply with a proper demand the stockholder may sue.¹² But if it appears that the request or demand is not in good faith, or that it is a simulated one, a court of equity will not entertain the action.¹³ And if the corporation had itself done previously what the complaining stockholder is seeking to do on

Fox v. Hale & Norcross etc. Min. Co., 108 Cal. 475, 41 Pac. 328.

7. *Fox v. Hale & Norcross etc. Min. Co.*, 108 Cal. 475, 41 Pac. 328.

8. *Chetwood v. California Nat. Bank*, 113 Cal. 649, 45 Pac. 854; *Fox v. Hale & Norcross etc. Min. Co.*, 108 Cal. 475, 41 Pac. 328.

9. *Fox v. Hale & Norcross etc. Min. Co.*, 108 Cal. 475, 41 Pac. 328; *McArthur v. John McArthur Co.*, 39 Cal. App. 704, 179 Pac. 700.

10. *Ashton v. Dashaway Assn.*, 84 Cal. 61, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091; *James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117. And see the following decisions in the federal courts of cases arising in California: *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, see, also, *Rose's U. S. Notes*; *Huntington v. Palmer*, 104 U. S. 482, 26 L. Ed. 833, see, also,

Rose's U. S. Notes; *Dannmeyer v. Coleman*, 11 Fed. 97, 8 Sawy. 51.

11. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376 (demand need only be made on the persons claiming to be directors); *Savings & Trust Co. v. Bear Valley Irr. Co.*, 112 Fed. 693, and see *Bear Valley Land etc. Co. v. Savings etc. Co.*, 117 Fed. 941, affirming *Savings & Trust Co. v. Bear Valley Irr. Co.*, 112 Fed. 693.

12. *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111. And see cases cited *supra* and *infra*.

13. *Morrison v. Stone*, 103 Cal. 94, 37 Pac. 142; *Bacon v. Irvine*, 70 Cal. 221, 11 Pac. 646; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, see, also, *Rose's U. S. Notes*.

its behalf, this showing would be fatal to his action.¹⁴ It is no defense in an action against the trustees of a corporation, however, that it was in the power of the plaintiff stockholders, if they had chosen to do so, to elect a new board of trustees, and in this way have caused an appropriate action to be brought in the name of the corporation.¹⁵

Since a demand upon the corporation and its refusal to act is a necessary preliminary to the stockholder's action, it is clear that a demand and refusal should be averred,¹⁶ unless the circumstances are such that a demand would be useless.¹⁷ A demand by another stockholder not in privacy with the complainant or in any way connected with his request cannot avail the complainant.¹⁸

§ 268. Excusal of Demand.—It is a familiar rule that where the relation between the parties is such that a demand and refusal is a condition precedent to the right to maintain an action, a denial in the answer of the relation on which the action is founded will dispense with the necessity of an averment in the complaint of a previous demand and refusal, for the law does not require a useless act to be performed.¹⁹ Hence, where the facts are such as to show that if a demand had been made upon the directors it would have been refused or that it would be unavailing, it need not be alleged in the complaint by the stockholder.²⁰ And where the action, if commenced by

14. *Glidden v. Diamond* 66 Cattle etc. Co., 178 Cal. 562, 174 Pac. 667.

15. *Parrott v. Byers*, 40 Cal. 614.

16. *Cogswell v. Bull*, 39 Cal. 320; *Gorham v. Gilson*, 28 Cal. 479; *Savings & Trust Co. v. Bear Valley Irr. Co.*, 112 Fed. 693.

17. *Glidden v. Diamond* 66 Cattle etc. Co., 178 Cal. 562, 174 Pac. 667. See *infra*, § 268, and see *ACTIONS*, vol. 1, p. 343.

18. *Dannmeyer v. Coleman*, 11 Fed. 97, 8 Sawy. 51.

19. See *ACTIONS*, vol. 1, p. 343.

20. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788. And see *S. C.*, 106 Cal. 329, 39 Pac. 603; *Moyle v. Landers' Admr.*, 83 Cal. 579, 23 Pac. 794; *Parrott v. Byers*, 40 Cal. 614 (where existence of the corporation was denied).

It is improbable that directors would sue themselves to recover

the corporation, would be under the control and management of those who constitute a majority of the trustees of the corporation sued, and who, therefore, might at any time cause it to be dismissed, the demand is excused, for in such case it would be nugatory.¹

§ 269. Intervention Where Corporation Neglects Rights.

It is a general rule that where a corporation defendant refuses to defend an action, or, having begun a defense, it is made to appear that the corporation will not press it in good faith, a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation; but he must show that he cannot induce those in control to do that which is right in the matter.² Where the suit is against the corporation for the use of the persons constituting a majority of the board of directors and in which the answer admits all the causes of action, there can be no doubt of a stockholder's right to intervene, and in such case it is not necessary to aver a request to the corporation officers to defend the action.³ But the stockholder may not bring an independent suit where such a suit by the corporation would not lie; he must set up his defense in the main action.⁴

for the corporation money which they fraudulently misappropriated; *James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117.

1. *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *Parrott v. Byers*, 40 Cal. 614 (holding that an allegation that defendants are the duly elected trustees of the corporation is an allegation that they are the only trustees); *Moyle v. Landers*, 3 Cal. Unrep. 113, 21 Pac. 1133. See *Shively v. Eureka etc. Min. Co.*, 129 Cal. 293, 61 Pac. 939, where in a suit against a corporation for the benefit of a majority of the board of directors, demand was held not

necessary; and *Cogswell v. Bull*, 39 Cal. 320, holding that an allegation that the present board is "nearly, if not entirely," composed of the same persons who committed the wrong is not sufficient to raise the issue as to whether demand and refusal would be necessary.

2. *Favorite v. Superior Court*, 181 Cal. 261, 8 A. L. R. 290, 184 Pac. 15; *Waymire v. San Francisco etc. R. Co.*, 112 Cal. 646, 44 Pac. 1086.

3. *Shively v. Eureka etc. Min. Co.*, 129 Cal. 293, 61 Pac. 939.

4. *Waymire v. San Francisco etc. R. Co.*, 112 Cal. 646, 44 Pac. 1086.

Applying the general rule stated above, where corporate property has been sold under execution and no steps are taken by the officers to redeem it within the period limited therefor, a stockholder may interpose and redeem it for the benefit of the corporation.⁵ Also, where there is a void judgment against the corporation, and the corporation is defunct, stockholders are permitted to intervene to expunge such judgment from the records.⁶

§ 270. Persons Who may Sue as Stockholders.—As a general rule, only a stockholder of record can maintain the action on behalf of the corporation.⁷ Nevertheless it has been held that though the stockholder bringing the suit does not appear as such on the books, as between him and unfaithful trustees who have no equities to be protected, he is the owner and entitled to maintain the action.⁸ And in a suit by several stockholders on behalf of the corporation, proof that one of the plaintiffs was a stockholder is

5. *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Wright v. Oroville Gold Min. Co.*, 40 Cal. 20 (holding that the stockholder may hold the corporation liable for the money advanced for the purpose of redemption, becoming subrogated to the rights of the purchaser at the execution sale). See *Williams v. Savings & L. Soc.*, 133 Cal. 360, 65 Pac. 822, where in action by stockholder to redeem land from mortgage executed by corporation, the court found that the plaintiff was not a stockholder and therefore could not maintain action.

6. *Lowe v. Superior Court*, 165 Cal. 708, 134 Pac. 190; *Newhall v. Western etc. Min. Co.*, 164 Cal. 380, 128 Pac. 1040; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335; *Slayden v. O'Dea*, 29 Cal. App. Dec. 267, 189 Pac.

1062. It is to be noted here, however, that in cases where the corporation is defunct, the stockholders do not really sue as such, but rather as the successors in interest, the title vesting in them.

7. *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 Pac. 158 (holding that a purchaser of stock after the dissolution of the corporation cannot maintain the action, inasmuch as he could not become a stockholder of record); *Williams v. Savings & Loan Soc.*, 133 Cal. 360, 65 Pac. 822.

8. *Parrott v. Byers*, 40 Cal. 614. See *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376, holding that an illegal sale of the plaintiff's stock does not determine his interest in the corporation so as to prevent him from bringing the action on behalf of the corporation.

sufficient to maintain the action.⁹ Causes of action belonging to the corporation increase the value of the corporate estate, and, when enforced, inure to the benefit of all the stockholders without distinction. Hence, a stockholder may have a right to maintain an action even though he acquires his stock after the frauds complained of, and whether he acquired the stock by purchase from one who was a holder of shares at the time of the alleged fraudulent transaction or whether he became a stockholder by subscription.¹⁰

§ 271. Parties Plaintiff.—Any one or any number of stockholders may, in a proper case, bring suit on behalf of the corporation.¹¹ But it is not necessary that a plaintiff stockholder should join with him the other stockholders or that he should make them defendants in the action. He has the right to bring the action in his own name and for his own individual account, as well as on behalf of the other stockholders. If his allegations are not sufficient to show that the action was brought in behalf of others than himself, the action in his own behalf is not impaired by an averment that he brings it for them as well as for himself.¹² And where the suit is brought on behalf of all stockholders who may see fit to join as plaintiffs therein, there is no legal objection to the joining of a

9. Parrott v. Byers, 40 Cal. 614.

10. Beal v. Smith, 31 Cal. App. Dec. 649, 189 Pac. 341 (holding that a stockholder who became such through transfer of stock from the treasury without notice of the fraud is a proper party plaintiff in the action); Harvey v. Meigs, 17 Cal. App. 353, 119 Pac. 941. See Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, see, also, Rose's U. S. Notes, contra, holding that there should be an allegation that complainant was a shareholder at the time of the transactions of

which he complains or that his shares have devolved on him since by operation of law. See, also, Dannemeyer v. Coleman, 11 Fed. 97, 8 Sawy. 51, following the decision in Hawes v. Oakland, supra. The rule as expressed by the state court in Harvey v. Meigs, however, is in accord with the weight of authority.

11. Moyle v. Landers, 3 Cal. Unrep. 113, 21 Pac. 1133.

12. Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

stockholder as plaintiff after the filing of the original complaint where it is shown that he was from the beginning and still is a stockholder.¹³ But the practice of separate stockholders bringing separate suits has been vigorously condemned.¹⁴

§ 272. Parties Defendant.—Directors of the corporation are properly made parties defendant to a stockholder's suit.¹⁵ And it is entirely proper to join as defendants all who are alleged to have been in some way connected with the transactions complained of.¹⁶ Likewise, other stockholders who do not join the plaintiff may be joined as defendants, inasmuch as they are proper though not necessary parties.¹⁷ It has been held that it is not necessary, however, to join as parties directors who were mere tools and representatives of the defendants and who were not shown to have had any interest in the fruits of the transactions complained of.¹⁸ And where it is alleged that the defendant stockholders formed a conspiracy to defraud the corporation and that they controlled the entire board of directors at all times since the organization of the corporation, it is not material who were the directors, for the action in such case is against the defend-

13. *Moyle v. Landers' Admr.*, 83 Cal. 579, 23 Pac. 794.

14. See *Dannemeyer v. Coleman*, 11 Fed. 97, 8 Sawy. 51 (case arising in California).

15. *Moyle v. Landers*, 3 Cal. Unrep. 113, 21 Pac. 1133; *Harvey v. Meigs*, 17 Cal. App. 353, 119 Pac. 941 (where the personnel of the offending board has not changed, complete relief cannot be afforded without their being brought in as codefendants).

16. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788. See *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494, holding that in an action

to recover dividends, the claimants under an invalid assignment should properly be made parties to the action against the corporation, but that the objection may be waived by failure to make it by answer or demurrer.

17. *Bailey v. Cox*, 102 Cal. 333, 36 Pac. 650.

18. *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111. See *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024, holding that failure to join directors charged with fraud as parties defendant is waived by failure to raise the question by demurrer or answer.

ants, not against the directors, although the directors should also be made parties.¹⁹ Since an action by a stockholder is entertained only on behalf of the corporation and on a corporate cause of action,²⁰ and as a stockholder must allege the refusal of the corporation to commence the action,¹ the corporation should be made a party defendant,² although relief is asked against individual defendants only and no complaint is made as against the corporation.³ An appeal in the proceeding necessarily brings up the corporate defendant, and it would seem that at no stage can that defendant be dismissed from the case without working a discontinuance.⁴

§ 273. Limitation of Actions.—A suit by a stockholder to redress a corporate wrong is not an action contemplated by section 359 of the Code of Civil Procedure to enforce a liability created by law.⁵ The right to prosecute the action is governed by the provisions of section 338, subdivision 4, of the Code of Civil Procedure, as an action for relief on the ground of fraud, in which case the cause of action is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud.⁶ The action is barred three years after knowledge of the fraud is obtained by the corporation, which is the real party in interest; and where all the stockholders and directors participate or have direct knowledge of the

19. *Harvey v. Meigs*, 17 Cal. App. 353, 119 Pac. 941.

20. See *supra*, §§ 263, 266.

1. See *supra*, § 267.

2. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Gorham v. Gilson*, 28 Cal. 479; *Moyle v. Landers*, 3 Cal. Unrep. 113, 21 Pac. 1133; *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

3. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

4. *Beach v. Cooper*, 72 Cal. 99, 13 Pac. 161.

5. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

6. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312; *Moyle v. Landers*, 3 Cal. Unrep. 113, 21 Pac. 1133; *Beal v. Smith*, 31 Cal. App. Dec. 649, 189 Pac. 341; *James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117; *Dannmeyer v. Coleman*, 11 Fed. 97, 8 Sawy. 51.

fraud or facts sufficient to put a prudent man on inquiry, knowledge is imputed to the corporation and the stockholders as of the time of its commission.⁷ But the fact that the action is barred as against one stockholder with knowledge does not constitute a bar against another who acts promptly upon learning of the fraud,⁸ at least if he became a stockholder before the statute has made a complete bar as to the entire corporation.⁹ But a stockholder must always act promptly and use due diligence in bringing his action.¹⁰ In a case where the corporation and its directors are under the domination of those who committed the fraud, the corporation is in the same position as an incompetent person or a minor without legal capacity, and during such period of disability the statute of limitations does not run against it.¹¹

XI. STOCKHOLDERS' MEETINGS AND ELECTIONS.

Meetings.

§ 274. Notice in General.—There are three matters concerning every corporate meeting of which the stockholders or members are entitled to notice, namely, the time, place and the business proposed to be transacted. Some or all of these may be known to the stockholders by virtue of a charter provision, by-law or statute. But if any of them is not known in that way, the stockholders are entitled to an actual notice thereof,¹² unless there has been a waiver

7. *Beal v. Smith*, 31 Cal. App. 621, 154 Pac. 312; *Beal v. Smith*, Dec. 649, 189 Pac. 341.

8. *Whitten v. Dabney*, 171 Cal. 341. See *supra*, § 266.

9. *Beal v. Smith*, 31 Cal. App. 621, 154 Pac. 312.

10. *Wills v. Porter*, 132 Cal. 516, 64 Pac. 896; *Wills v. Porter*, 6 Cal. Unrep. 492, 61 Pac. 1109.

11. *Whitten v. Dabney*, 171 Cal. 341.

12. *Dolbear v. Wilkinson*, 172 Cal. 366, Ann. Cas. 1917E, 1001, 156 Pac. 488 (holding that the giving of notice to stockholders by mailing notice to them is sufficiently evidenced by the affidavit of the secretary, together with his

of notice or estoppel to claim that notice had not been given.¹³ Under the general rule, therefore, where the by-laws provide the day upon which the annual meeting shall be held, but do not designate the hour of the meeting, there is no sufficient notice.¹⁴ In general the regularity of the proceedings as shown in the minutes and records of a corporation is presumed.¹⁵ Hence, where a meeting was held at which directors were elected, it will be presumed that all the stockholders have been notified as required, nothing to the contrary appearing.¹⁶ And starting from the presumption of regularity of the proceedings, as shown in the minutes, the court is not bound to believe contrary testimony of stockholders in the face of their written certificate contradicting their testimony.¹⁷

Statutes designate those who are to call meetings of the stockholders and give notice thereof.¹⁸ And provision is made for the calling of meetings by a justice of the peace on written application of three or more of the stockholders or members, where, from any cause, there is no person authorized to issue the call for, or to preside at, a meeting.¹⁹

direct testimony as to the truthfulness of his affidavit).

13. See *infra*, § 277.

14. *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534.

15. *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

16. *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130 (notice ordered given by commissioner of the court).

17. *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

18. See Civ. Code, § 301 (meeting to adopt code of by-laws—notice given by order of acting president); Civ. Code, § 304 (meeting to repeal,

amend or adopt new by-laws to be called by the directors, if not the annual meeting; Civ. Code, § 310 (removal of directors—called by president, or by a majority of the directors, or by members or stockholders holding at least one-half of the votes, the call being addressed to the secretary, who must thereupon give notice); Civ. Code, § 359 (meeting to authorize increase or diminution of capital stock or creation or increase of bonded indebtedness to be called by the board of directors); Civ. Code, § 401 (meeting to authorize extension of corporate existence to be called by the directors).

19. Civ. Code, § 311.

§ 275. Notice of Purpose.—The code provides that in certain instances the notice of a stockholders' meeting shall specify the object of the meeting, as, for example, when it is proposed to increase or diminish the capital stock, or create a bonded indebtedness;²⁰ when it is proposed to remove directors;¹ or (where the meeting is called for the purpose) to repeal or amend the by-laws or adopt new by-laws;² or to consider a dissolution of the corporation;³ or to authorize an extension of its corporate existence.⁴ In the absence of statutory provision, the stockholders are, under the general principles governing corporations, entitled to specific notice of the purpose of a meeting. This is the unquestioned rule governing special meetings and the better practice is that where unusual business is to be transacted, even at a regular meeting, the notice of that meeting should state the unusual business. Clearly, therefore, a special meeting will not be authorized to elect directors in the absence of a notice specifying that such election is one of the purposes of the meeting, for in the absence of such notice a stockholder would have no reason to believe that this important business would be transacted at any meeting other than the one designated by the code and the by-laws, that is, the annual meeting or an adjournment thereof. And a notice stating that the purpose of a meeting is "to transact such business as may come before the said meeting" is not, of course, a notice that the election of directors, or any other specific matter is to be taken up at such meeting. The rule that the purpose or object of a directors' meeting, need not ordinarily be specified has no application to stockholders' meetings, which are governed by stricter rules.⁵

20. See Civ. Code, § 359, subds. 2, 3.

1. See Civ. Code, § 310.

2. See Civ. Code, §§ 301, 304.

3. See Code Civ. Proc., § 1223.

4. See Civ. Code, § 401.

5. *Dolbear v. Wilkinson*, 172 Cal. 366, Ann. Cas. 1917E, 1001, 156 Pac. 488. See *infra*, § 428, as to directors' meetings.

§ 276. **Place of Meeting.**—The statute fixes the place for holding meetings of the stockholders as the office or principal place of business of the corporation.⁶ However, objection to the place of meeting will be waived by attendance and participation in the meeting of all the stockholders of the company.⁷ And even the fact that the annual meeting of the stockholders for the election of directors is held outside the state of incorporation, and held contrary to the by-laws of the corporation, will not cause the proceedings at the meeting to be wholly void. The sounder view in such cases is said to be that the proceedings of the stockholders are not void but are merely voidable, and that the corporation and all stockholders who participated in the meeting are estopped to claim its invalidity.⁸

§ 277. **Waiver of Notice and Estoppel.**—It is a rule under the code and the authorities that a meeting not regularly called is nevertheless valid if attended and participated in by all the stockholders of the company, for such attendance and participation is a waiver of objection.⁹ The stockholders, when so assembled, may elect

6. Civ. Code, § 319.

7. Guaranty Loan Co. v. Fontanel, 183 Cal. 1, 190 Pac. 177.

8. Ellsworth v. National Home etc. Builders, 33 Cal. App. 1, 164 Pac. 14.

9. See Civ. Code, § 317; Guaranty Loan Co. v. Fontanel, 183 Cal. 1, 190 Pac. 177; Dolbear v. Wilkinson, 172 Cal. 366, Ann. Cas. 1917E, 1001, 156 Pac. 488; San Buenaventura Mfg. Co. v. Vassault, 50 Cal. 534 (meeting cannot be held until after notice of time and place thereof is first given in some authentic and legal mode, unless all the stockholders be actually present and consent in person or

by proxy); Guaranty Loan Co. v. Treadwell, 35 Cal. App. Dec. 643, 200 Pac. 653; Ellsworth v. National Home etc. Builders, 33 Cal. App. 1, 164 Pac. 14 (the stockholders who participated in the meeting are estopped to deny the validity of its proceedings); Lowe v. Los Angeles Suburban Gas Co., 24 Cal. App. 367, 141 Pac. 399 (to the effect that the validity of a meeting held without notice must depend upon the showing either that it was held with written consent of all or that all of stockholders were present, and holding that a finding of fact that there was a stockholders' meeting implies that a

officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation.¹⁰ Likewise, a meeting is valid as to stockholders not present where they sign a waiver of notice of the meeting and this is made a part of its records.¹¹ And it is a principle of corporation law that participation by an officer in issuing a call is a waiver by him of informalities in such call.¹² The mere fact that stockholders are present at a meeting of which defective notice has been given is not a waiver of want of notice, if they do not participate in its doings, for they do not consent thereto merely by attending the meeting.¹³ If, therefore, a party relies on the invalidity of proceedings taken at a meeting, it is for him to state affirmatively the facts showing it to have been improperly held, and his nonparticipation in its proceedings. It may not be necessary for the stockholders to have been notified as prescribed by law, since even in the absence of such notice the conditions set forth in section 317 of the Civil Code may have been present, and if so, failure to give legal notice would be wholly immaterial.¹⁴ Only the stockholders holding the beneficial interest in all the stock need be present and participate in such meeting,¹⁵ for persons who own no such interest are not such parties as can complain.¹⁶ While a statute providing for notice may be deemed to be

written consent had been given by all of the stockholders to the meeting).

10. Civ. Code, § 313.

11. See Civ. Code, § 317.

12. *Saline Valley Salt Co. v. White*, 177 Cal. 341, 170 Pac. 820.

13. *Dolbear v. Wilkinson*, 172 Cal. 366, Ann. Cas. 1917E, 1001, 156 Pac. 488.

14. *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710 (creation of bonded indebtedness).

15. *Guaranty Loan Co. v. Fon-*

tanel, 183 Cal. 1, 190 Pac. 177 (where legal demand had been made for transfer of certain stock, which should have been complied with but was not, and meeting was attended by stockholders holding all other stock and having beneficial interest in the stock whose transfer was demanded, held that meeting was attended by all stockholders entitled to be present).

16. *Guaranty Loan Co. v. Treadwell*, 35 Cal. App. Dec. 643, 200 Pac. 653.

directory and not imperative, the rule is said to be different where the constitution provides for the giving of notice; in the latter case it has been held that notice cannot be waived.¹⁷

§ 278. Duty to Call Annual Meetings.—Directors are required to be elected annually by the stockholders or members of the corporation,¹⁸ although, as a matter of law, directors once elected continue in office until they resign or until their successors have been elected.¹⁹ Where the officers whose duty it is to issue the call or give notice of the meeting either fail or refuse to do so, the stockholders are not without remedy, for they may avail themselves of the remedy by mandamus to compel the board of directors to issue the call.²⁰ But the imposition of the duty to call meetings upon the officers best qualified to perform it does not relieve the corporation itself from the responsibility for causing that duty to be performed. Hence, action may be taken against the corporation to compel performance of such duty. And it has been held that the court may appoint a commissioner to call a stockholders' meeting.¹ Where the duty is imposed, not by statute, but by by-laws providing that the annual meeting may be held on a certain day, the word "may" will be construed to mean "must" or "shall."²

17. *Navajo Min. etc. Co. v. Curry*, 147 Cal. 581, 109 Am. St. Rep. 176, 82 Pac. 247.

18. Civ. Code, § 302; *Dolbear v. Wilkinson*, 172 Cal. 366, Ann. Cas. 1917E, 1001, 156 Pac. 488; *Wickersham v. Brittan*, 93 Cal. 34, 15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51; *Kinard v. Ward*, 21 Cal. App. 92, 130 Pac. 1194.

19. *Kinard v. Ward*, 21 Cal. App. 92, 130 Pac. 1194.

20. *Powers v. Marine Engineers Ben. Assn.*, 35 Cal. App. Dec. 99,

199 Pac. 353 (where an election had been previously held under an invalid by-law permitting voting by mail); *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516, 150 Pac. 643. See *Pennington v. George W. Pennington Sons*, 170 Cal. 114, 148 Pac. 790, where a judgment was secured directing the president to call a meeting under the by-laws.

1. *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130.

2. *Pennington v. George W. Pennington Sons*, 170 Cal. 114, 148

§ 279. Notice of Annual Meeting.—The annual election of directors of corporations is provided for by law, and notice of such election must be given as prescribed in the code, unless all of the stockholders waive such notice in writing;³ that is, the meeting must be called by giving two weeks' notice of the same by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located.⁴ However, corporations are empowered to make by-laws governing the time of the annual meeting and the method of giving notice thereof, and also to adopt a by-law dispensing with the giving of notice of regular meetings.⁵ And so it has been held that since the annual meeting is a regular meeting—and usually the only regular meeting of the stockholders—the corporation may adopt a by-law dispensing with the notice, the court doubting, however, the wisdom of this procedure. But as to the time, place and manner of holding the annual election, section 302 of the Civil Code is plainly the general rule upon the matter, applying to all corporations, unless they take advantage of the provisions of section 303 and adopt by-laws covering the same matter in a different manner.⁶ Of course, if the by-laws do not provide the hour for the meeting, notice thereof must be given.⁷ Where notice of the meeting is not given as required, a board elected will be *de facto* and not *de jure*.⁸

§ 280. Time of Holding Annual Meeting.—The statute provides that if no provision is made in the by-laws for

Pac. 790; *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516, 150 Pac. 643. See STATUTES.

3. Civ. Code, § 302.

4. Civ. Code, § 301 (which makes provision for meeting to adopt by-laws). See *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191, as to what constitutes a two-weeks' publication of notice under the statute.

5. Civ. Code, § 303, subds. 1 and 4.

6. *Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177. See, also, note in 8 Cal. Law Rev., p. 434.

7. *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534.

8. *Dahl v. Palache*, 68 Cal. 248, 9 Pac. 94 (religious corporation).

the time of the annual election, it must be held on the first Tuesday in June.⁹ Generally speaking, it has been said, the annual meeting of the stockholders for the election of officers need not be held on the day named in the by-laws but may be held on a later day;¹⁰ but if held on a different day from that designated and without notice, the board of directors elected will not be *de jure*.¹¹ Under section 11 of the Civil Code providing that where the date of performance of certain acts of a secular nature falls upon a holiday they may be performed on the next ensuing business day with like effect as though performed on the appointed day, a stockholders' meeting falling upon a Sunday may properly be called for the following business day.¹²

Elections.

§ 281. **In General.**—Power to elect directors is lodged in the hands of stockholders and the corporation cannot by its by-laws, resolutions or contracts take it away.¹³ So, the method provided by the statute for the election of the officers and provisions respecting their qualification and terms of office cannot be set aside even by vote of the majority of the stockholders.¹⁴ Mere irregularities, however, will not render election proceedings invalid, provided the substantial rights of stockholders or members are not affected.¹⁵ Corporate elections are business affairs, not controlled by the laws affecting general elections and should, it has been said, be conducted in a business way and in a manner affording all stockholders the fullest

9. Civ. Code, § 302.

10. Saline Valley Salt Co. v. White, 177 Cal. 341, 170 Pac. 820. See *infra*, § 284.

11. First African M. E. Zion Church v. Hillery, 51 Cal. 155 (religious corporation).

12. Saline Valley Salt Co. v. White, 177 Cal. 341, 170 Pac. 820;

Cf. Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92 (regular directors' meeting).

13. Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

14. Holt v. California Dev. Co., 161 Fed. 3, 88 C. C. A. 167.

15. Clopton v. Chandler, 27 Cal. App. 595, 150 Pac. 1012.

liberty in expressing their wishes, disregarding technical matters which enter into general elections controlled and restricted by special statutes.¹⁶ Thus, where before votes are counted, ballots are returned to stockholders who cast them in order that they may be corrected to show cumulation of votes and thus express the true intention of the voters, in the absence of acts constituting fraud as to the minority, the result is clearly one in harmony with the wishes of the majority of the stockholders. Where a by-law provides that all questions touching the qualification of voters, validity of proxies and the acceptance or rejection of votes shall be decided by a committee on elections, such committee and not the board of directors possesses the sole right to determine as to how long the polls shall be kept open to entitle the stockholders to vote their stock, and in the absence of an abuse of discretion, its action in that regard will not be disturbed by the courts.¹⁷

§ 282. Attacks on Validity of Elections.—Section 315 of the Civil Code provides that upon the application of any person or body corporate aggrieved by any election held by any corporate body, the superior court of the county in which such election is held must, upon petition and notice, proceed forthwith to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice.¹⁸ This provision has appli-

16. *Zierath Combination Drill Co. v. Croake*, 21 Cal. App. 222, 131 Pac. 335.

See notes, 2 A. L. R. 558 and 8 A. L. R. 678, as to power of directors to change time for regular meetings of stockholders.

17. *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012, per Shaw, J.

18. See *infra*, § 283, as to who may

attack validity under this code provision.

A superior court sitting as a court of equity would have jurisdiction to inquire into the validity of an election and to set it aside, if not in conformity with law, whether the statute conferred such jurisdiction upon it or not; *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac.

cation only to the elections which are by the statute authorized to be held by the stockholders. It is not intended to apply to a case where a director, regularly appointed to fill a vacancy caused by the resignation of an elected director, is refused recognition of his rights by some of the other members of the board and excluded from participation in the action of the board, for in such case he is not aggrieved by any "election"; and for such a grievance his remedy must be sought in a different proceeding.¹⁹ If the person adjudged elected by the court below is recognized as such by his fellow-directors, the other party has no recourse pending an appeal. In such case, the parties to the action cannot be restrained from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment.²⁰ Likewise, if the party adjudged elected by the court below is refused recognition and prevented from attending a meeting of the directors, the power of the court to punish those so interfering with his rights is no greater pending appeal than they were prior to the rendition of judgment.¹

§ 283. Persons Who may Attack Validity of Elections.
A "party aggrieved" within the meaning of section 315 of

376; *Wright v. Central California etc. Co.*, 67 Cal. 532, 8 Pac. 70. See *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534 (where no statute is referred to, yet action brought to determine validity of election); *Stats.* 1850, p. 347, sec. 15, in force then made substantial provisions as section 315. See *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237, holding that although a statute should confer authority to hear and determine a contest upon the judge at chambers, the proceeding is clearly of a judicial character.

19. *Wickersham v. Murphy*, 93 Cal. 41, 28 Pac. 793.

20. *Dulin v. Pacific Wood etc. Co.*, 98 Cal. 304, 33 Pac. 123.

1. *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58 (holding that the court has no power in the action, where proceedings have been stayed by appeal from a judgment determining the contest, to punish any of the directors for contempt for refusal to recognize a director adjudged to have been elected or to permit him to act as such in disobedience to the judgment).

the Civil Code must be prejudiced in his substantial rights; hence, however illegal an election may be, one not a stockholder cannot be aggrieved by reason thereof.² It follows that one claiming to have been elected as director who, at the time of the election, did not possess the qualifications of a director prescribed by the corporate by-laws at the time of election, is not entitled to any relief on a proceeding to test the validity of the election, under section 315 of the Civil Code.³ While a stockholder may be disqualified from voting at an election because he did not have stock in his own name on the books of the corporation sufficiently long prior to the election to entitle him to vote,⁴ he is not, however, disqualified from instituting proceedings to set aside the election, if it was voidable.⁵ And a sale of stock by a board of directors illegally elected does not determine the relation of the stockholder to the corporation and prevent him from bringing the action.⁶ Where a county owns shares of stock in a corporation it is directly interested in the conduct and management of the affairs of the company, and, therefore, in the selection of officers, and it has the same right as any other stockholder to contest the election of directors.⁷

§ 284. Adjournments—Postponement of Election.

“Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if for any reason there is not present a majority of

2. *Saline Valley Salt Co. v. White*, 177 Cal. 341, 170 Pac. 820; *Copton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012.

3. *Waterbury v. Temescal Water Co.*, 11 Cal. App. 632, 105 Pac. 940. See *supra*, § 282, as to attacks on validity generally under Civ. Code, § 315.

4. See Civ. Code, § 312 (to entitle a stockholder to vote, the stock must have stood on the books

of the company in his own name at least ten days prior to the election). See *infra*, § 286.

5. *Wright v. Central California etc. Co.*, 67 Cal. 532, 8 Pac. 70.

6. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376. See *supra*, § 263 et seq., as to suits by stockholder on behalf of corporation.

7. *Hornblower v. Duden*, 35 Cal. 664.

the subscribed stock or members, or no election had, such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors.”⁸

And where the by-laws provide that the annual meeting shall be held on a certain day, in case of failure to complete the election or other business presented for consideration, those present are authorized to adjourn the meeting from time to time until the business is accomplished, or until a quorum is in attendance.⁹ But section 314 of the Civil Code provides that

“If from any cause an election does not take place on the day appointed by law or the by-laws, or otherwise, it may be held on any day thereafter as is provided for in such by-laws, or to which such election may be adjourned or ordered by the directors. If an election has not been held at the appointed time, and no adjourned or other meeting for the purpose has been ordered by the directors, a meeting may be called by the stockholders as provided in section three hundred and ten.”¹⁰

This provision that where the election is not had at the time appointed and the by-laws have not provided for election at any other time, it may be held at some other time ordered by the directors or a meeting may be called by the stockholders “as provided in section 310,” thereby incorporates not only the provisions of the latter section prescribing the preliminary steps of directing a call to the secretary, but also those requiring the subsequent notice “of the time, place and object of the meeting,” and such notice must be signed by stockholders “holding one-half the votes,” as provided in the latter section.¹¹

§ 285. Removal of Directors.—The board of directors may be removed from office by a vote of two-thirds of the

8. Civ. Code, § 312, in part.

11. *Dolbear v. Wilkinson*, 172

9. *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012.

Cal. 366, Ann. Cas. 1917E, 1001, 156 Pac. 488.

10. See *infra*, § 285, for provisions of Civ. Code, § 310.

members or of stockholders holding two-thirds of the capital stock, at a general meeting held after previous notice of the time and place, and of the intention to propose such removal, call and notice being given as specially provided by law, and a new board may be elected at the same meeting, in case the board of directors is so removed.¹² The statute, while it authorizes the removal of the whole board, denies the power to remove less than the whole number. The reason for this is that by the system of cumulative voting sanctioned by section 307 of the Civil Code, a minority may obtain representation in the board; if so, a director elected to represent a minority of one-third ought not to be removed by the subsequent vote of the other two-thirds, and the system of cumulative voting and minority representation thus made ineffective.¹³ It is also within the general power of a court of equity to remove directors if it is deemed necessary, when they have proven unfaithful to their trust.¹⁴ And so, where the allegations show all directors to have been guilty of fraudulent practices and develop the impracticability of effecting their removal through the provisions of section 310 of the Civil Code, equity will effect the removal.¹⁵ It has been held that proceedings under the act of March 21, 1872, for the removal of the officers of a corporation are special and not according to the course of the common law, and to invest the court with jurisdiction it must appear from the face of the record that the requirements of the act have been complied with.¹⁶

12. Civ. Code, § 310.

13. Code commissioner's note to section 310 of the Civil Code, amendment of 1905 (Stats. 1905, p. 558), changing first sentence of the section from: "No director shall be removed from office unless by a vote of two-thirds of the members or of stockholders holding two-thirds of the capital stock," etc. See

infra, § 290, as to cumulative voting.

14. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *California Fruit etc. Assn. v. Superior Court*, 8 Cal. App. 711, 97 Pac. 769.

15. *California Fruit etc. Assn. v. Superior Court*, 8 Cal. App. 711, 97 Pac. 769.

16. *Chollar Min. Co. v. Wilson*,

Stockholder's Right to Vote.

§ 286. **In General.**—It is provided by section 312 of the Civil Code that at all elections or votes had for any purpose in corporations formed for profit, there must be a majority of the subscribed capital stock or of the members represented, either in person or by proxy in writing. It is further provided that every person acting therein, in person or by proxy or representative, must be a member thereof or a stockholder having stock in his own name on the stock books of the corporation at least ten days prior to the election.¹⁷ Moreover, a stockholder is not precluded from voting at a meeting upon any question in which he has an individual interest adverse to any of the other stockholders.¹⁸ Each shareholder is entitled to vote in accordance with his ownership of stock, and the fundamental right to vote is based upon such ownership and not merely upon shares, which are but representatives of value.¹⁹ When a majority of shares are spoken of, reference is had to subscribed or issued or outstanding shares. Thus section 312 means that there must be a majority of the subscribed capital stock represented either in person or by proxy at all meetings of stockholders.²⁰ The general rule for all corporations being that a stockholder must have stock in his name on the books at least ten days

66 Cal. 374, 5 Pac. 670. See, also, *In the Matter of the Boston Min. & M. Co.*, 51 Cal. 624, holding the act applied to mining corporations as well as other corporations.

17. See also Civ. Code, § 307: "All elections must be by ballot and every stockholder shall have the right to vote in person or by proxy the number of shares standing in his name, as provided by section 312 of this code."

It might be noted that section 12 of article XII of the constitution

provides that "In all elections for directors or managers of corporations every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him," without any restriction as to the time when he must hold such shares of record.

18. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

19. *Film Producers v. Jordan*, 171 Cal. 664, 154 Pac. 605.

20. *Market Street Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

prior to an election in order to be entitled to vote, an act authorizing the holders of indorsed certificates of stock in mining corporations to vote at the election of directors thereof, though the stock is not registered in their names upon the books for a period of ten days, is special legislation and in violation of section 25 of article XI of the constitution.¹ Since section 312 of the Civil Code covers not only elections, but all "votes for any purpose," the words "ten days prior to the election" are to be read, in case of a vote for a purpose other than an election, as referring to a period prior to the meeting at which the vote is had.²

At all meetings only those stockholders actually present are entitled to vote, unless proxies from nonattending stockholders are held by some person present at the meeting and such proxies are executed in accordance with law.³ In the absence of statute on the subject, therefore, a by-law permitting voting by mail is in contravention of law.⁴ All elections must be by ballot, and every stockholder has the right to vote in person or by proxy the number of shares standing in his name,⁵ and to cumulate his vote should he desire to do so.⁶ The general rule of stockholders' meetings, in the absence of statute, is that the majority governs, and every stockholder contracts that such shall be the rule.⁷ For the election of a board of di-

1. *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30 (holding that no reason exists for such classification of corporations for the purpose of making rules for the conduct of elections); *Krause v. Durbrow*, 127 Cal. 681, 60 Pac. 438.

2. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123 (dictum).

3. Civ. Code, § 321b. See *infra*, § 291, as to proxies.

4. *Powers v. Marine Engineers Ben. Assn.*, 35 Cal. App. Dec. 99, 199 Pac. 353 (where by-law was

passed prior to a law permitting voting by mail).

5. Civ. Code, § 307. See *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530 (holding that before a court can invade the rights of a stockholder by enjoining the voting of his stock for the election of directors, he must be represented in the action in some way, and that he is an indispensable party to such action).

6. See *infra*, § 290.

7. *San Diego etc. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 783, 44 Pac. 333; *Bassett*

rectors, however, it appears that a majority vote is not necessary to elect, but only a majority vote of the stockholders present, a quorum being necessary.⁸

Voting by corporations.—It is obvious that a corporation cannot be present in person at a stockholders' meeting. A corporation stockholder should by resolution authorize an officer or other person to vote its stock and it may ratify and confirm the acts of proxies appointed by pledgees of some of its stock.⁹ But the corporation for which the election is held cannot vote its own stock held by it, nor can such stock be voted by anyone for it.¹⁰

§ 287. Record Holder of Stock.—Upon principle, in the absence of statute, it has been said that the real owner of stock should be entitled to represent it at meetings of the corporation, and the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege.¹¹ However, the statute provides that the voter must have stock standing in his own name on the books of the company.¹² In some jurisdictions,

v. Fairchild, 6 Cal. Unrep. 458, 61 Pac. 791 (holding that stockholders may ratify acts by majority vote which they could have provided for in the first instance).

8. Guaranty Loan Co. v. Treadwell, 35 Cal. App. Dec. 643, 200 Pac. 653 (where out of a total of one thousand shares, a board was elected by three hundred and forty-nine votes, the court having restrained the voting of a block of two hundred and forty-nine other shares).

9. Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

10. Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Smith v. San

Francisco & N. P. Ry. Co., 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582 (citing Brewster v. Hartley, supra, and other authority).

11. People v. Hill, 16 Cal. 113 (holding that a surviving partner had the power to vote the stock of a partnership even though standing in the name of the deceased partner alone).

12. Smith v. San Francisco etc. Ry. Co., 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582 (referring to the provisions of Civ. Code, § 312, and distinguishing the case of People v. Robinson, 64 Cal. 373, 1 Pac. 156, involving the construction of the act

the books furnish prima facie evidence of the stockholder's right; in others, the showing of the corporate records is conclusive. In California, so far at least as domestic corporations are concerned, the test of the right to vote as a stockholder at corporate meetings is the ownership of shares as disclosed by the record books of the corporation ten days before the vote.¹³ While the constitution guarantees to every stockholder the right to vote, in person or by proxy, the number of shares of stock owned by him,¹⁴ prima facie such ownership is that which is disclosed by the proper record books of the corporation.¹⁵

§ 288. Bona Fide Stockholder.—Under a statutory provision requiring every person acting in any election or vote, in person or by proxy or representative, to be a member of the corporation or a "bona fide" stockholder, having stock in his own name on the books of the corporation,¹⁶ an inquiry is authorized into the character of the

of 1853, which related to the voting of stock held by any person as executor, administrator, guardian or trustee). See, also, *infra*, § 289. And see cases cited *infra*, this section, and *infra*, §§ 288, 289.

13. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

14. See Const., § 12, art. XII.

15. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123. See *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582, where the court in construing section 312 of the Civil Code, at page 593, comments on use of word "stockholder" rather than "owner," but without reference to

the constitutional provision contained in article XII, section 12. See *infra*, § 288, as inquiry into character of holding.

16. See Civ. Code, § 312, before amendment by Stats. 1905, p. 559, the code commissioner saying as to the amendment, "For the purposes of election, a person appearing upon the books of the corporation to be a stockholder, should be permitted to vote, and election officers should not be vested with authority to deny such a stockholder the right to vote or to claim that for some reason he is not a bona fide stockholder" (referring to *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582, and adopting by the amendment the view of Chief Justice Beatty in his dissenting opinion in that case).

holding.¹⁷ And so it has been held, where the real owners of the stock in such case, for the sole purpose of avoiding statutory liabilities, caused the stock to be registered in the names of persons having no interest in it, that the nominal holders were not entitled to vote at an election for directors.¹⁸ Likewise, where stock had been issued to a person as trustee, but where he had no interest therein and where the stock had been issued to him without the knowledge of the owners, such person was held not to be a bona fide stockholder under the statute and had no legal right to vote the stock as such.¹⁹

§ 289. Pledgee, Trustee or Personal Representative.—Section 313 of the Civil Code provides that

“The shares of stock of an estate of a minor, or insane person, may be represented by his guardian, and of a deceased person by his executor or administrator, and, except when otherwise agreed, all shares of stock standing on the books of a corporation in the name of any person as pledgee or trustee, may be represented or voted by such pledgee or trustee only when such pledgor or beneficial owner fails to represent and vote the same.”

Thus, the pledgor of stock may vote it where there is no agreement with the pledgee under which the latter can claim the right. One cannot control stock not owned by himself otherwise than by a written proxy, unless transferred to him upon the books, by force of the statute regu-

17. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582 (under such a statute one in whose name stock has been registered upon the books of the corporation, but who has never had any interest in the stock, is only a dummy for the real owner, and is

not a bona fide stockholder within the meaning of such statute).

18. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. See *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123, commenting on the *Smith* case.

19. *Stewart v. Mahoney Min. Co.*, 54 Cal. 149.

lating elections.²⁰ But a pledgee does not convert stock to his own use by having it transferred upon the books, merely to protect his rights as pledgee, and where he votes the stock, not as his own, but as pledgee thereof.¹ A trustee, as against the corporation and all the world, except the cestui que trust, is the legal owner of stock, and no inquiry may be had touching his actions in voting such stock.² But stock belonging to the corporation cannot be voted by anyone, even if held by someone as trustee.³ The provision in section 313 of the Civil Code respecting the stock of an estate of a minor, insane or deceased person indicates that the guardian or executor or administrator, as the case may be, is entitled to vote the stock without having it transferred upon the books;⁴ and the fact that a decedent had held the stock subject to a trust does not alter the case.⁵

§ 290. Cumulative Voting.—The constitution provides as to the manner of voting in all elections for directors or managers of corporations that every stockholder shall have the right to vote the number of shares of stock owned by him, for as many persons as there were directors or managers to be elected, or to cumulate his shares “and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit; and such

20. *Dulin v. Pacific Wood etc. Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

1. *Foto v. Bussell*, 31 Cal. App. Dec. 1, 187 Pac. 432.

2. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225 (citing Civ. Code, §§ 307, 312).

3. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237 (holding that where a certificate of stock issued to a creditor of the corporation in

pledge to secure his debt is illegally issued, it cannot be voted by the pledgee or by anyone).

4. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582; *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *London etc. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663.

5. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

directors or managers shall not be elected in any other manner."⁶ And certain of the provisions of section 307 of the Civil Code are to the same substantial effect.⁷ The principle of cumulative voting has been authorized and approved in the interests of minority representation,⁸ and has been considered of sufficient importance to make it, as has been seen, part of the organic law. A corporation holding an election for directors is bound to follow the constitutional mode of cumulative voting and has no power to adopt any other. If, therefore, but a single director is balloted upon at a time, a majority of stockholders are enabled by combining their votes each time upon a single candidate to elect him, and by thus shaping and controlling the manner of the election it would be in the power of the majority to virtually cancel the votes of the minority and deprive them of their right to representation on the board of directors. To comply with the constitutional provision, all of the directors to be elected must be balloted for on a single ballot.⁹ Since each stockholder possesses the legal right to cumulate his votes in favor of any director, it is immaterial that he has been influenced in so doing by suggestions of outsiders, other stockholders or officers of the corporation, or even by an election committee of the stockholders.¹⁰ If a stockholder has stock sufficient to elect himself by cumulation

6. Const., art. XII, § 12 (containing proviso that members of co-operative societies formed for agricultural, mercantile, and manufacturing purposes may vote on all questions affecting such societies in the manner prescribed by law).

7. See *supra*, § 286, as to stockholder's right generally.

Section 310 of the Civil Code, providing for the removal of directors, was amended to require the removal of the entire board and to prevent the removal of an in-

dividual director, in order to protect the right of cumulative voting. See *supra*, § 285, for code commissioner's note to amendment of 1905 to Civ. Code, § 310.

8. *People's Home Sav. Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452.

9. *Wright v. Central California etc. Water Co.*, 67 Cal. 532, 8 Pac. 70.

10. *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012.

of his shares in voting, a court cannot relieve him from his neglect so to vote, and cannot declare him elected nor order a new election. He is bound by the results of the election unless he can show that it was illegal.¹¹

§ 291. Right to Vote by Proxy.—At common law a stockholder had no right to cast his vote by proxy,¹² but in this country the right so to vote is very generally recognized.¹³ In California, even apart from the statute, the right is deemed to be a substantial one, and is not restricted under section 312 of the Civil Code to corporate elections, but extends to all votes had for any purpose,¹⁴ and so it has been held that a corporation may by its by-laws provide that stockholders may vote by proxy at any meeting, and in pursuance of such by-laws the stockholders may be represented by proxy at a meeting at which a bonded indebtedness is authorized.¹⁵ Executors, administrators, guardians and trustees may give proxies,¹⁶ as also may married women.¹⁷ But where stock has been transferred to trustees as security for advances, and conceding that the creditor thus secured could lawfully vote it at an annual election, he is, nevertheless, bound to vote it in the interest of those who are the real owners, and has

11. *Dulin v. Pacific Wood etc. Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

12. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

13. See 7 *Ruling Case Law*, p. 341.

14. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225 (holding that section 303 of the Civil Code also permits the corporation to provide for the mode of voting by proxy). See Const., art. XII, § 12; Civ. Code, §§ 303, 312; and cases cited *infra* this section, and *infra*, § 292.

The right to vote by proxy is a substantial one, and cannot be taken from the stockholder or even abridged by the by-laws; *People's Home Sav. Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452. See *infra*, § 292, as to valid and invalid restrictions on the right; and *infra*, § 294, as to voting agreements.

15. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

16. Civ. Code, § 321b.

17. Civ. Code, § 325.

no right to give proxies as a mere matter of favor or for a consideration.¹⁸

Where one agrees for the benefit of the corporation to transfer his stock with proxy irrevocable and has violated his contract, he may be compelled to perform his agreement in an action to declare the election of the board of directors void and illegal;¹⁹ but, of course, a void verbal agreement to vote stock cannot be specifically enforced.²⁰ If the validity of disputed proxies will not change the result of an election, their mere invalidity will not invalidate the election itself.¹

§ 292. Restrictions on Proxies.—Proxies must be executed in writing by the member or stockholder himself, or by his duly authorized attorney, and no proxy is valid after the expiration of the period of eleven months from the date of its execution, unless the member or stockholder executing it shall have specified therein the length of time for which it is to continue in force, which must be for some limited period, in no case to exceed seven years from the date of execution; and all proxies are revocable at the pleasure of the person executing them.² No particular form of words is requisite to constitute a proxy. Like any other agency, the instrument by which it is created may be informal; but if, in order to give effect to its language in view of the purpose for which it is executed, it is necessary to construe the instrument as creating an agency, such construction will be given.³ A by-law must not be unreasonable nor violative of statute; and since section 312 of the Civil Code in broad terms gives stockholders

18. *Fox v. Hale & Norcross etc.* 366, Ann. Cas. 1917E, 1001, 156 Min. Co., 108 Cal. 369, 41 Pac. 308. Pac. 488.

19. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376.

20. *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207. See *infra*, § 294.

1. *Dolbear v. Wilkinson*, 172 Cal.

2. Civ. Code, § 321b.

3. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. See AGENCY, vol. 1, p. 728, as to oral authority generally.

the power to appoint a proxy—an attorney in fact—to represent them at elections held by the corporation, a by-law providing that a proxy may be voted only by a stockholder is unreasonable and violative of the statute. The stockholders in many corporations being limited in number, a case might often arise where absent stockholders would not be able to find persons to whom they could intrust their interests.⁴ And if the right exists to fix the life of a proxy through by-law provision at all, that life cannot be fixed at so short a period as thirty days, for such a period is unreasonable, as it would, under many circumstances, serve to disfranchise a stockholder.⁵

§ 293. Separation of Voting Power and Ownership.—

It is not illegal nor against public policy to separate the voting power of the stock from its ownership. Since the statute authorizes voting by proxy, and places no limitation upon the right of selection, a stockholder may appoint as his proxy one who is an entire stranger to the corporation.⁶ The right to appear by proxy implies that voting power may be separated from the ownership of stock, and, unless the authority of a proxy is limited by the terms of his appointment, he is necessarily required to use his own discretion in any vote that he gives. Being an agent, he is required to exercise this discretion in behalf of his principal; but he is at liberty to use his own discretion as to

4. *People's Home Sav. Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452. See Civ. Code, § 321b, permitting a corporation having no capital stock to prescribe in its by-laws the persons who may act as proxies for members.

5. *Saline Valley Salt Co. v. White*, 177 Cal. 341, 170 Pac. 820 (from the opinion of the district court of appeal, the point not being decided by the supreme court).

See Civ. Code, § 321b, permitting corporation having no capital stock to prescribe in its by-laws the length of time for which proxies may be executed.

6. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. See *People's Home Sav. Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452; and see *supra*, § 292.

the means by which his principal's interest will be best subserved.⁷ The cases in which it has been said that a stockholder cannot divest himself of voting power, and that it should not be separated from ownership of the stock, are, it has been said, those which involved either the sufficiency of the agreement by which the voting power was transferred or the validity of the purpose for which the power was to be exercised.⁸

A proxy must exercise a discretion of the same nature as that which the stockholder is authorized to exercise, and an authority to do otherwise would be invalid. Under an appointment without words of limitation, the proxy may act against the interests of the stockholders, or even against the interests of the corporation, and the corporation, as well as the stockholder, will be bound by his act as fully as if the stockholder had acted in person, while, if the authority had been directed in terms to that act, it might have been invalid. The distinction is that between an unlawful exercise of a lawful power, and the attempt to authorize the exercise of an unlawful power. If the purpose of a proxy given upon a sufficient consideration is lawful, and the person by whom the proxy was created continues to be the owner of the stock, the agreement will not be held invalid.⁹

§ 294. Voting Agreements.—It has been declared to be within the power of parties holding stock to contract with reference to their property as fully as with regard to any other property. And it is not in violation of any rule of law for stockholders owning a majority of the stock in a corporation to cause its affairs to be managed in such a

7. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. See cases cited in that case; and see also 7 Ruling Case Law, pp. 350, 351.

8. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582.

9. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582.

way as they may think best calculated to further the ends of the corporation, and for this purpose to appoint one or more proxies who shall vote in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect, and they may do this either by themselves or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Whether such an agreement is illegal, so that any action or vote under it can be set aside, or is of such a character that it will not be enforced, will depend upon the object with which it is made or the acts that are done under it, and will be governed by other rules of law.¹⁰ In a case where a verbal agreement had been entered into among stockholders accompanying a division of stock and a loan of money, to the effect that one of the stockholders who loaned money to another to purchase stock should be president of the company for two years and should receive a stipulated salary so long as he should retain an interest in the corporation, it has been held (upon the theory that the agreement provided no means for the accomplishment of the end or purpose to be accomplished) that such an agreement is void and cannot be specifically enforced.¹¹

10. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582, per Harrison, J. See dissenting opinion of Beatty, C. J., in *Smith v. San Francisco etc. Ry. Co.*, supra, where it is said that the contract involved was void as against the policy of the law giving to the holders of a majority of the stock of a corporation the right of control, its sole purpose and object being to give to a minority of the stockholders the power to control

the affairs of the corporation against the will of the majority, and where it is further said: "I am satisfied that the weight of authority is against the validity of any contract by which the sole owner of stock parts irrevocably with the right to vote it, with the effect of putting a minority in control of the corporation."

11. *Dulin v. Pacific Wood etc. Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207 (Beatty, C. J., dissenting).

§ 295. **Voting Trusts.**—In cases of voting trusts, where the owners of stock transfer the shares to trustees with authority to vote at elections according to the directions of a majority of those holding trust certificates, and the only consideration for which transfer and agreement is the mutual promises of the several stockholders, it has been held that any stockholder may revoke his agreement and withdraw his stock at will, and that stockholders who become such after an agreement of this nature is entered into are not bound by its terms, but hold their shares freed from the limitations of the agreement.¹² Whether or not such an agreement is valid depends upon its object. The law does not forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders.¹³ In the case of stockholders of a corporation organized for the purpose of marketing agricultural products, it is expressly provided that the execution of pooling or voting trust agreements is not prevented by the statutory provisions.¹⁴ And since corporations may own stock, it is evident that stock may be transferred to a cor-

12. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582.

13. *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. See *Williams v. Ashurst Oil etc. Co.*, 144 Cal. 619, 78 Pac. 28, where the question as to whether agreement as to "pool stock" was void was not argued and hence not decided; *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 Pac. 695, where stock was held by trustee to be voted by him under pooling agreement, but validity of such agreement not passed upon; *Cortelyou v. Imperial Land Co.*, 166 Cal.

14, 134 Pac. 981, holding that right of action by subscriber to enforce issuance of certificates accrued immediately upon making full payment and became barred in four years, and that a pooling agreement referred to in the subscription contract would have been no defense to such action to enforce issuance of certificates where not in existence at time of contract and no steps ever taken to create the contemplated pool; *Ellsworth v. National Home etc. Builders*, 33 Cal. App. 1, 164 Pac. 14, where the pooling agreement was never consummated.

14. Civ. Code, § 321a.

poration as a holding corporation to effect the same purpose.¹⁵

XII. LIABILITY FOR FULL PAYMENT FOR STOCK.

Payment for Corporate Stock.

§ 296. **In General.**—It is provided by the constitution that

“No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void.”

An identical provision is contained in the Civil Code.¹⁶ This provision declares the settled policy of the state. A corporation is not allowed to effect, under the guise of a purchase of property, a fictitious increase of stock and cannot increase its stock to an unreasonable amount beyond the value of the property actually received.¹⁷ The purpose of the provision is to preserve the property of the corporation and thus protect and maintain the rights of creditors and minority stockholders as against any such manipulation or disposal of the capital stock by owners of a majority thereof as might result in the serious impairment, if not the complete destruction of the rights of such creditors and minority stockholders.¹⁸ In other words, the design of such provision is to prevent the corporate stock from being transferred or disposed of without a sufficient consideration in the form of money or property or labor performed. But by this it must not be

15. See § 570, as to right to hold stock.

16. Const., art. XII, sec. 11; Civ. Code, § 359.

17. *Ewing v. Oroville Min. Co.*, 56 Cal. 649.

18. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030 (where it is

stated that the law forbidding the issuance of stock except for value is for the benefit of creditors and to secure equality among stockholders); *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49; *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190.

understood that the consideration must be equal in value to the stock. If there is a present consideration of some sort, and the transaction is one that is intended to benefit the corporation in the prosecution of its purposes, and is not a mere device to evade the law and accomplish that which is forbidden, then the consideration is sufficient and in a sense adequate, although not equal in value to that of the stock.¹⁹

§ 297. Right to Issue Stock Without Full Payment.—

A corporation possesses the power to issue its stock, and a condition precedent to the exercise of that power may, under a statute, be the purchase of and payment for the stock.²⁰ By virtue of power to issue and dispose of its shares, under the constitutional provision a corporation has the right to exchange stock for property other than money, and the right, except as the conditions imposed by the commissioner of corporations affect the matter, to sell or exchange such stock on a less than par basis of valuation,¹ subject, however, to the right of creditors to require stockholders to respond in an amount equaling the difference between the price paid and the par value of the shares.² But the power to issue the stock does not include the power to issue it to secure a loan or indebtedness, for, as has been pointed out, in such case the directors might issue and pledge all the capital stock not held by stockholders as security for a trifling loan, and by the aid of stock thus issued they might increase the capital stock and pledge the new stock to secure another loan, and thus

19. *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190, per Hart, J.

20. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237 (under Railroad Act of 1850, § 14, Gen. Stats., p. 128). But see *supra*, § 157, as to issuance prior to full payment.

1. *Winters v. Lindsay*, 34 Cal. App. Dec. 875, 198 Pac. 43. See

infra, § 298, as to exchange not fictitious or void.

2. *Mills v. Brady*, 61 Cal. Dec. 376, 196 Pac. 776; *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11; *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457; *Winters v. Lindsay*, 34 Cal. App. Dec. 875, 198 Pac. 43.

perpetuate themselves in power beyond the reach of redress on the part of stockholders who may have contributed the larger portion of the assets.³ Ordinarily, of course, the issuance and acceptance of corporate stock, regular upon its face, carries with it a presumption that it was issued for a lawful purpose, although such presumption will not prevail in the face of proof to the contrary.⁴

§ 298. Fictitious Stock.—Under the rule that the consideration is not required to be equal in value to the stock,⁵ if there is a valuable consideration for the issue and transfer of the stock, then such issue and transfer will not be void as in violation of the code section and provision of the constitution.⁶ The constitution has not declared what was meant by the use of the word “fictitious” further than what the word itself implies, taken in connection with the context; but it has been said that the use of that word was as in contrast with the preceding sentence—as if to say that stock issued for money paid, labor done, or property actually received is not fictitious.⁷ Thus, where property is exchanged for stock, although the stock is of a par value many times the value of the property, the issue is not fictitious and void, especially where the value of the property is equal to the full cash value of the stock.⁸ Where, however, the issue is entirely with-

3. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

4. *Hanson v. Sherman*, 25 Cal. App. 169, 143 Pac. 73 (where it is said that an issue ultra vires of stock by way of pledge being a nullity, would not have the effect of transforming the pledgee into a stockholder). See *supra*, § 219 et seq., as to pledge of stock generally.

5. See *supra*, § 296.

6. *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000.

7. *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710 (holding that any stock issued for a valuable consideration named in section 359 of the Civil Code is properly considered as “subscribed” capital stock).

8. *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

out consideration of any sort or kind, it is void, and the certificates issued are likewise void;⁹ and this being true, the parties receiving them do not become shareholders, nor make themselves liable to creditors for unpaid subscriptions.¹⁰ Thus, where a corporation parts with a large amount of its capital stock as a gift pure and simple, this is in violation of the constitutional provision,¹¹ and an ultra vires issue of stock does not make the holder a stockholder, since the issue is a nullity.¹² But a stockholder cannot repudiate his liability under section 359 of the Civil Code while he is seeking to enforce subscriptions made under the same circumstances as his own.¹³ And in a case where stock has been issued, without consideration, by the fraud of a corporate agent and taken by a purchaser or pledgee in good faith, the corporation is estopped from disputing the authority of its own officers to issue the stock.¹⁴

9. *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 Pac. 695; *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117; *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190. See, however, *Home Sav. Bank v. Los Angeles City Realty Co.*, 176 Cal. 731, 171 Pac. 290, where the court found that nothing had been paid on the shares issued as fully paid, but where the question of the validity of the issue evidently was not raised. And see *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136, where it is said that stockholders who paid one-third the par value, cannot be treated as holding their stock as a mere gratuity.

10. *J. F. Lucey Co. v. McMullen*,

178 Cal. 425, 173 Pac. 1000; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

11. *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190 (dictum in this case, but citing authority to the rule); *Quartz Glass etc. Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648 (holding condition in note given for stock, which would have effect of making the transaction a gift, to be void as a secret condition).

12. *Hanson v. Sherman*, 25 Cal. App. 169, 143 Pac. 73 (action on stockholder's individual liability).

13. *Richardson v. Chicago Packing etc. Co.*, 6 Cal. Unrep. 606, 63 Pac. 74.

14. *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779 (holding that the mere fact that the stock was issued to one of the officers of the corpora-

§ 299. Issue by Corporation in Financial Straits.—

Where a corporation has need of money for the purposes of its business, and the stock is sold at its actual market value, and only in such quantities as may produce the requisite funds, it cannot be held that the issue is fictitious.¹⁵ In general, where stock is issued for less than par in cases where a corporation is beginning or preparing to begin the business for which it was formed, and where the stock is issued in return for money or property which is to form its capital, the creditors of the corporation have recourse against the stockholders holding such stock for the difference between the purchase price and its par value;¹⁶ and this is the rule even though, as between the corporation and its stockholders, it had been agreed that the stock should be taken as fully paid up.¹⁷ But a different situation arises when a corporation, after it has been for some time engaged in doing business, has become so involved or financially embarrassed as to find it necessary, in order to meet its obligations or obtain money or property essential to the further conduct of its operations, to issue some portion of its stock at less than its par value, but as fully paid-up stock, as bonuses for loans or in payment of obligations already accrued. In cases of this latter type, the rule as to the right of a creditor is relaxed, in that it is not held applicable where the stock was issued by a going concern for a consideration other than money and of undetermined value, where no element of bad faith entered into the transaction and where the stock was not shown to have any greater actual value at the time of the

tion raises no suspicion of the want of authority to issue it).

15. *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Atlantic Trust Co. v. Woodbridge etc. Irr. Co.*, 79 Fed. 842; *Union Loan & T. Co. v. Southern California etc. Road Co.*, 51 Fed. 840.

16. See *infra*, §§ 305-308.

17. *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915A, 1265, 133 Pac. 488; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 379, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057. See *infra*, § 300.

issuance and transfer than that for which it was taken as fully paid-up stock.¹⁸

§ 300. Validity and Effect of Agreements That Stock is Fully Paid.—As between stockholders and the corporation, agreements that stock shall be fully paid by the payment of less than the par value are binding,¹⁹ even where the payment is in cash greatly below the par value.¹ In the absence of fraud, transactions of this character are legal,² and no public policy is violated, irrespective of

18. *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000 (citing as favoring the rule declared: *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, 11 Sup. Ct. Rep. 530; *Fogg v. Blair*, 139 U. S. 118, 35 L. Ed. 104, 11 Sup. Ct. Rep. 476; see, also, *Rose's U. S. Notes; Starboard National Bank v. Slater*, 117 Fed. 1002). See *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377, which declared that where stock was issued at the highest market price, under the decisions of the court the purchasers were not liable for any unpaid balance. But see *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057, explaining and repudiating the statement above noted in *Kellerman v. Maier*, *supra*, and where the court declined to follow the rule supported by the cases decided in the federal courts, *supra*, stating as a reason that such cases "greatly impair the trust fund doctrine," and declaring that "no sufficient grounds appear for the distinction made." And see *Merchants' Mut. Adj. Agency v. Davidson*, 23 Cal. App. 274, 137 Pac. 1091, where it was held that the rights of a creditor of an insolvent

corporation are not affected by the fact that the corporation was in financial straits, and sold its stock in good faith to relieve its embarrassment. See *infra*, § 310, as to bonuses.

19. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779; *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100; *Richardson v. Chicago Packing etc. Co.*, 6 Cal. Unrep. 606, 63 Pac. 74; *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190. And cases cited *infra*.

1. *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057 (cash); *Merchants' Mut. Adj. Agency v. Davidson*, 23 Cal. App. 274, 137 Pac. 1091. See note vol. 2, Cal. Law Rev., p. 237.

2. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779; *Smith v. Ferries & C. H. Ry. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

what the agreed price is.³ It follows that a stockholder owning shares ostensibly fully paid, but not so in fact, owes no duty to the corporation to make good the difference, and there is no obligation on his part which is an asset of the corporation or which the corporation may enforce.⁴ Where stock is issued as fully paid, in an action between stockholders paying in property and those paying in cash, the latter are estopped to deny the full payment of the stock, no creditors' rights being involved.⁵

It has been held that where stock is issued as fully paid in exchange for property grossly or fraudulently overvalued (commonly known as watered stock), a transferee of such stock who did not participate in the transaction whereby it was originally issued and who took unaware of the character of such transaction, is not liable to a judgment creditor of the corporation for any part of the difference between the par value of the stock and the actual value of the property exchanged therefor; and it is incumbent upon the plaintiff, in an action by a judgment creditor against a transferee of such watered stock, to allege in his complaint and prove that such transferee, when he acquired his stock, was fairly chargeable with knowledge of the fraudulent transaction whereby the stock, issued as fully paid, was issued in exchange for the overvalued property.^{5a}

§ 301. Issuance of Certificate as Representation of Full Payment.

"All corporations for profit must issue certificates for stock when fully paid up, signed by the president and sec-

3. *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

4. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838.

5. *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100.

5a. *California National Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414 (holding that this case did not come within the rule of *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000).

retary, and may provide, in their by-laws, for issuing certificates prior to full payment, under such restrictions and for such purposes as their by-laws may provide, but any certificate issued prior to full payment must show on its face what amount has been paid thereon."⁶

Certificates issued prior to the amendment of the section in 1905 were not, if there was nothing in them to indicate whether they were fully paid, equivalent to a representation that the shares were fully paid up.⁷ Consequently the fact that a stockholder taking such a certificate did not know of the existence of an unpaid balance at the time he became a stockholder did not excuse him from liability where he failed to make inquiry on the subject.⁸ A sale of reserved stock below par as paid-up stock was not unlawful as violating the section since it merely enjoined the duty of issuing certificates when the stock was fully paid up and authorized the stockholders to enact by-laws in accordance with which the corporation might issue certificates before full payment but did not prohibit their issuance before fully paid up.⁹ It has been held that no inference against full payment is to be drawn from the silence of the certificate. On the contrary, where the case involves the rights of purchasers from original subscribers, it is a rule that the presumption arising from the certificate in this form, if there be any presumption, is that the stock is fully paid for.¹⁰ The fact that a certificate does not com-

6. Civ. Code, § 323, in part (amended in 1905 by adding clause requiring a certificate issued prior to full payment to show the amount paid thereon).

7. *Geary St. etc. Ry. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457; *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. B. A. (N. S.) 283, 108 Pac. 711; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1. And see generally cases cited *infra*, this section, and *infra*, §§ 311-314.

8. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457.

9. *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100.

10. *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166, per Sloss, J. See *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11, distinguishing cases of *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. B. A. (N. S.) 283, 108 Pac. 711, and *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal.

ply with the requirements of section 323, as amended, does not excuse the subscriber from paying for his shares as required by his contract.¹¹

§ 302. The "Trust Fund" Doctrine.—Many of the earlier cases in California declare the doctrine that the property of a corporation constitutes a fund primarily liable to the creditors, and to be preserved as a security for them,¹² and that unpaid subscriptions constitute, in equity, a fund available to creditors of the corporation.¹³ This, the so-called "trust fund" doctrine, is recognized generally in the decisions.¹⁴ The essence of the doctrine

53, 97 Pac. 1, as to liability of transferees of stock issued as fully paid, but not so in fact, on the ground that before the amendment to Civil Code, section 323, the issuance of certificates without notation as to full or partial payment was not a representation of full payment. The court stated that the decisions differed apparently from the general rule but their correctness was of no particular importance now because of the amendment to section 323. Wilbur, J., in his dissenting opinion, construes the holding of the court to be that where a certificate is issued under this law, a bona fide purchaser without notice may rely upon the representation by the corporation and is not liable for the deficiency in payment for the stock.

11. *Ferrochem Co. v. Danziger*, 23 Cal. App. 584, 138 Pac. 966.

12. See *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365, and *San Francisco etc. R. Co. v. Bee*, 48 Cal. 398, which were cases decided under a statutory provision forbidding payment of any part of the capital to the stockholders.

13. *Harmon v. Page*, 62 Cal. 448; *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875 (holding that such unpaid fund was a guaranty to creditors that all obligations up to that amount would be met, and that it was the stake held out for the public, upon the faith of which the company obtains credit); *Conroy v. Dunlap*, 104 Cal. 133, 37 Pac. 887.

14. *B. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915A, 1265, 133 Pac. 488; *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; *Pasadena Rapid Transit Co. v. Munson*, 37 Cal. App. 352, 174 Pac. 109; *Merchants' Mut. Adj. Agency v. Davidson*, 23 Cal. App. 274, 137 Pac. 1091; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70. See *California Nat. Supply*

is that a corporation is conclusively presumed to have sought credit upon the faith of its apparent capital, and public policy requires that the question whether a particular creditor did trust the corporation on that basis, or not, shall not be inquired into. The doctrine, of course, is applicable only to corporations which have become insolvent, a corporation not being hampered by the idea while a going concern.¹⁵

Rule as to mining corporations.—The trust fund doctrine was held in a federal case to be inapplicable to corporations formed to develop mining property, upon the ground that, according to general practice so well known that no creditor could be supposed to be ignorant of it, the stock of such corporations is never fully paid in, the property being of speculative value.¹⁶ At first the rule excepting the application of the trust doctrine from mining corporations was confined to such corporations,¹⁷ but the later cases finally repudiated the whole doctrine of its application to mining cases, as no longer expressing the law in force in California.¹⁸ Hence, it is now the general rule that stockholders are liable to creditors for the difference between the value of the property exchanged for stock and the par value of the stock, and this rule is applicable to all classes of corporations.^{18a}

Co. v. Black, 32 Cal. App. Dec. 525, 191 Pac. 715 (apparently restating the trust fund doctrine, although some doubt appears as to whether stock had been issued as fully paid up).

15. Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057, per Temple, J.

16. In re South Mountain etc. Min. Co., 5 Fed. 403, 7 Sawy. 30.

17. San Joaquin etc. Water Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Harmon v. Page, 62 Cal. 448.

18. Hasson v. Koeberle, 180 Cal. 359, 181 Pac. 387; California Nat. Supply Co. v. Dinsmore, 35 Cal. App. Dec. 93, 199 Pac. 552; California Nat. Supply Co. v. O'Brien, 34 Cal. App. Dec. 688, 197 Pac. 414 (inapplicable to oil mining corporations); California Nat. Supply Co. v. Black, 32 Cal. App. Dec. 525, 191 Pac. 715; Zierath v. Claggett, 31 Cal. App. Dec. 406, 188 Pac. 837. See note, vol. 8, Cal. Law Rev., p. 253.

18a. Hasson v. Koeberle, 180 Cal. 359, 181 Pac. 387.

Modification of the doctrine.—The trust fund doctrine as originally set forth has been gradually modified by the decisions. For instance, where it appears that a particular creditor, at the time of extending credit to the corporation, extended that credit with full knowledge of the difference between the par value of the stock and the value of property received for it, the stockholder cannot be held liable for the difference.¹⁹ Still another departure is apparent in the holding that the doctrine is inapplicable to a case where a corporation had been for some time a going concern and had become financially involved and issued a portion of its stock at less than par, but as fully paid up, and as a bonus for loans to it.²⁰ And the doctrine is inapplicable in certain cases where the stock is not sold for cash, but is issued in return for real or personal property having no defined value. In such cases the rule is that where the corporation and stockholder have agreed upon a given valuation for the property transferred, such valuation is binding and conclusive unless it is fraudulent in purpose or effect.¹ Lastly, the court has relieved innocent stockholders of the injustice of the trust fund doctrine by holding that one who is only a transferee of watered stock and who did not participate in the transaction whereby it was originally issued and who took his stock unaware of the character of that transaction, cannot be compelled to make good the false representation as to the capital of the company which he had no part in making, and the responsibility for which he has done nothing to assume, and by

19. *Sherman v. Harley*, 178 Cal. 584, 7 A. L. R. 950, 174 Pac. 901; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915A, 1265, 133 Pac. 488 (intimating that the giving of credit with full knowledge that the par value had not been paid for the stock would be a defense to suit by a creditor to recover the difference). See other cases cited *infra*, §§ 303, 304.

20. *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000; *Merchants' Mut. Adj. Agency v. Davidson*, 23 Cal. App. 274, 137 Pac. 1091, *contra*. See *infra*, § 310, as to stock issued as bonus.

1. *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166. See *infra*, §§ 305-307.

requiring an affirmative showing of participation or notice as to the transaction by which watered stock was issued.²

It is apparent, therefore, that the "trust fund" doctrine is gradually being superseded by a more reasonable and less artificial rule which places the right of recovery of unpaid balances of the par value upon the ground of fraud.³

§ 303. Fraud as Basis of Creditor's Rights.—The essence of the right of a creditor to attack the issuance of stock as fully paid and to show that it was not such and to compel the payment of the balance upon it is that its issuance as fully paid was, as to him, a fraud. This is now the view generally accepted in this country and is the view which obtains in California. Whether or not the trust fund doctrine can be considered as but another way of expressing the same underlying idea, the later decisions place the right of recovery against the owner of watered stock squarely upon the ground of fraud. Hence, where a creditor has not been misled by the fictitious capitalization, he has no cause of action.⁴ And likewise, the right of a creditor to attack an agreed valuation of property transferred to the corporation for stock rests upon fraud, actual or constructive.⁵ Persons deal with a corporation and give it credit on the faith of its ostensible capital—

2. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11 (which places the rule in this state in accord with the rule in the great majority of states); *Andrews v. Panama Oil Co.*, 34 Cal. App. Dec. 245, 195 Pac. 963.

3. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11; *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166. See *infra*, § 303.

4. *Rhode v. Dock-Hop Co.*, 184

Cal. 367, 12 A. L. R. 437, 194 Pac. 11, per Olney, J.

5. *Hasson v. Koeberle*, 180 Cal. 359, 181 Pac. 387; *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915A, 1265, 133 Pac. 488; *California Nat. Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414; *Andrews v. Panama Oil Co.*, 34 Cal. App. Dec. 245, 195 Pac. 963; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70. See *infra*, § 306.

on the strength of the appearances created by its articles of incorporation, whereby it proclaims to the world that it is capitalized for a certain amount. Those extending credit have the right to assume that it has paid in capital to the amount which it represents itself as having, and if they extend credit on the faith of that representation, and if that representation is false, a fraud is thereby perpetrated upon them.⁶

§ 304. Effect of Knowledge of Creditor.—Since the right of a creditor to attack an issue of stock for overvalued property is based upon the theory of fraud,⁷ where the attacking creditor at the time of extending credit has full knowledge that part of the corporation's ostensible capital is watered, and that the stock is not fully paid up, he has no cause of action against the stockholders to recover the difference between the par value of the stock and the actual amount paid in.⁸ The reason a subsequent

6. *California Nat. Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414; *Zierath v. Claggett*, 31 Cal. App. Dec. 406, 188 Pac. 837 (where it is said that when credit is extended, it is done so under the presumption that the capital stock issued has been or will be paid for in full, if necessary to pay creditors).

It is apparent that to this extent there is no difference between the trust fund doctrine and the present doctrine. The essential difference arises where a creditor attempts to hold an innocent purchaser, or a creditor with knowledge attempts to enforce the liability. See *infra*, §§ 304 and 314.

7. See *supra*, § 303.

8. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799 (where the creditor extended credit

before he had notice of the situation, but later accepted a promissory note in payment of the precedent obligation, with knowledge thereof); *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11; *Sherman v. Harley*, 178 Cal. 584, 7 A. L. R. 950, 174 Pac. 901; *California Nat. Supply Co. v. Dinsmore*, 35 Cal. App. Dec. 93, 199 Pac. 552; *California Nat. Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414; *Zierath v. Claggett*, 31 Cal. App. Dec. 406, 188 Pac. 837. See *California Nat. Supply Co. v. Black*, 32 Cal. App. Dec. 525, 191 Pac. 715, where the agent of the creditor was a stockholder and secretary of the corporation, but did not disclose to the creditor the fact, of which he had knowledge, that the capital stock at the time credit was ex-

creditor who has actual notice of the real state of affairs cannot disturb the arrangement between the company and its stockholders is that one who has such notice cannot claim that he was deceived by the false representation as to the amount of capital available for the satisfaction of the company's debts.⁹ The ultimate question for the trial court, to be determined from a consideration of all the circumstances and inferences reasonably deducible therefrom, is this: Can it fairly be presumed that at the times when plaintiff extended credit he relied upon the company's ostensible capitalization? can plaintiff be fairly presumed to have relied upon the misrepresentation of fact arising out of the deceptive appearances created by the apparent existence of an amount of capital greater than that which the company really possessed?¹⁰

§ 305. Issue of Stock for Property.—Anything that is real or personal property may be received by a corporation as consideration for the issue of its stock; and while an agreement to issue stock for property is an agreement that the stock to be delivered is approximately the value of the property, the corporation does not guarantee that the stock will always equal the value or estimated value of property received. The vendors of the property cannot, therefore, by leaving stock unissued in the hands of the corporation which is ready to issue it, elect to take the stock if it proves valuable and escape liability as stock-

tended was not fully paid, which information it was his duty, as the creditor's agent to disclose.

9. California National Supply Co. v. O'Brien, 34 Cal. App. Dec. 688, 197 Pac. 414.

10. California Nat. Supply Co. v. O'Brien, 34 Cal. App. Dec. 688, 197 Pac. 414, per Finlayson, J. (holding that the effect of a finding that plaintiff extended credit without actual knowledge of the fraudulent

transaction is not, as a matter of law, overcome by a finding that it had notice of facts sufficient to put it upon inquiry, and stating that on principle, creditors who extend credit to the corporation with only constructive notice of the fraud practiced upon them are not necessarily precluded from a recovery). See supra, § 303. As to actual and constructive fraud generally, see FRAUD AND DECEIT.

holders by refusing to take it if it does not.¹¹ Where the corporation owns no property, it is perfectly legal for all parties in interest to sell all or any part of the stock in return for property or for anything else of value. The stock can acquire value only by the corporation acquiring property, and if it chooses to issue all of its stock for a small value, it does what it has a perfect right to do.¹² In fact, corporations are often organized in part to acquire property.¹³

§ 306. Good Faith as to Valuation of Property.—When, at the inception of its enterprise, a corporation issues stock for money or for property of admitted value less than the par value of the stock, the subscribers giving such consideration may be held by creditors for the unpaid portion.¹⁴ In the case of an issue of stock for property, however, where a valuation has been agreed upon, so far as other stockholders are concerned, the transaction is conclusive, unless fraudulent as to them in purpose or in effect.¹⁵ But if there is fraud, or bad faith, or if the prop-

11. *Greenberg v. California etc. Rock Co.*, 107 Cal. 667, 40 Pac. 1053.

12. *Sargent v. Palace Cafe Co.*, 175 Cal. 737, 167 Pac. 146; *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312; *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303; *Turner v. Markham*, 155 Cal. 652, 102 Pac. 272; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838; *Chater v. San Francisco Sugar Refining Co.*, 19 Cal. 219.

13. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838; *Scadden Flat etc. Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440; *Smith v. Ferries etc. Ry. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710;

Western Nat. Bank v. Wittman, 31 Cal. App. 615, 161 Pac. 137. See *Greve v. Echo Oil Co.*, 8 Cal. App. 275, 96 Pac. 904. See *Doty v. California Rice Milling Co.*, 37 Cal. App. 449, 174 Pac. 389, holding that one who sells property to a corporation and accepts stock of the corporation in payment therefor retains no vendor's lien on the property.

14. *Sherman v. Harley*, 178 Cal. 584, 7 A. L. R. 950, 174 Pac. 901. See *supra*, § 297, as to right to issue stock without full payment; and *infra*, § 307, as to issue of stock for money.

15. *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915A, 1265, 133 Pac. 488 (citing authorities to various rules in other states).

erty is taken at a valuation known or believed by the parties to be in excess of the real market value, creditors may impeach the transaction, as a constructive fraud upon them, and the stock will be deemed paid only to the extent of the actual value of the property received.¹⁶ It is the value of the property in the condition it was in at the time of the exchange—the value as known to the parties and as they honestly believed it to be—that determines the liability at least where there is no subsequent increase in value nor any intentional fraud.¹⁷ And it will make no difference whether the corporation subsequently sells stock returned to it for more or less than par.¹⁸ It is not suffi-

16. *Jose v. Uteley*, 61 Cal. Dec. 589, 199 Pac. 1037; *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799; *Hasson v. Koeberle*, 180 Cal. 359, 181 Pac. 387; *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166.

17. *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915A, 1265, 133 Pac. 488.

Evidence should be admitted at the trial bearing on the belief of the corporators as to the value of the property, to the end that it may be determined what that belief was and whether it was in fact honest and intelligent. The finding, however, cannot be based upon a prospective earning power as determined at a time subsequent to the transfer of the property; *Hasson v. Koeberle*, 180 Cal. 359, 181 Pac. 387.

See *Mills v. Brady*, 61 Cal. Dec. 376, 196 Pac. 776, where the answer alleged the stock issue to be for property believed to be of a value equal to the par value of the stock, but where the allegations were found untrue by the court.

And see *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70, where it is said that the *Mills* case and *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377, come within the distinction expressed in *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; that had the case been the one where a road is constructed for a fixed sum of money and a definite amount of stock, it might, perhaps have been held that the stock was fully paid; but where the stock was given for a definite sum of money, it was the usual case of selling stock below par and no contract with the corporation would release the stockholder from liability to creditors.

18. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 575, 197 Pac. 799. But see *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047, holding that if the directors, immediately after issuing stock for property at a certain value, put stock on the market at a less valuation, this is a clear indication that they then believed

cient to prove merely that property was overvalued in an exchange for stock, but it must be clearly shown that it was done with fraudulent intent. Directors may be honestly mistaken as to the value of the property, and, in the absence of proof that their overvaluation was not the result of an innocent mistake, stockholders cannot be held liable for the difference between the true worth of the property and the par value of the stock.¹⁹

§ 307. Issue of Stock for Money.—Where stock is sold for money and at a price less than the par value, the difference remaining unpaid is, so far as the creditors are concerned, deemed money due the corporation from the stockholder.²⁰ But it is not true that in every case where stock is disposed of as paid-up stock at less than par value creditors can compel payment for their benefit of the difference between the par value and the actual value of the consideration given. For example, it has been held that the general rule above declared has no bearing upon the case of a sale of bonds in good faith by a going concern, where it is necessary for the payment of debts incurred in such business and to keep it going.¹ And the doctrine has no application where there is no element of bad faith and the stock is shown to have no greater actual value at the time of issuance than that for which it was taken as fully paid-up stock.² Coin paid in hand for issued stock makes that stock no different and no more valuable than

the stock already disposed of for property had no real value above the price at which the stock is sold in the market.

19. *Andrews v. Panama Oil Co.*, 34 Cal. App. Dec. 245, 195 Pac. 963.

20. *Sherman v. Harley*, 178 Cal. 584, 7 A. L. R. 950, 174 Pac. 901; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057. See discussion of this

rule and approval thereof in *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915A, 1265, 133 Pac. 488. But see *infra*, this section, and *supra*, § 299, as to modifications of the trust fund doctrine as declared in *Vermont Marble case*, *supra*.

1. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

2. *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000. See *supra*, § 299; and *infra*, § 310.

though it was properly issued for labor done or issued in exchange for property received by the corporation.³

§ 308. Stock Issued for Services or to Pay Debts.—A corporation may receive in full payment for stock the performance of labor or services,⁴ and where the contrary is not made to appear, it will be presumed that the transaction is perfectly fair.⁵ It is not necessary that the services be first performed, as a condition precedent to the vesting of title to the shares of stock received.⁶ Stock issued for valuable services rendered and labor performed for the corporation is not issued without consideration;⁷ and similarly, a corporation which owes money may issue stock to a creditor in payment of his claim, and such stock is issued for a valuable consideration.⁸

Issue to employees or persons conducting business.—By recent enactment, a corporation may, with consent of the stockholders, under such restrictions as they may impose, issue by way of additional compensation, or pursuant to sale, shares of its capital stock to employees of the corporation and to persons actively engaged in the conduct of its business, or to trustees for such employees or persons.

3. *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

4. *Brown v. National Electric Works*, 168 Cal. 336, 143 Pac. 606 (holding that an agreement whereby in consideration of the purchase of stock the corporation promises to employ the purchaser at a certain salary, implies a continuance of the employment for a reasonable time; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70 (legal services); *Ellsworth v. National Home etc. Builders*, 33 Cal. App. 1, 164 Pac. 14.

See note, 6 A. L. R. 277, as to liability upon stock subscription payable in services which are ren-

dered unnecessary by the insolvency of corporation, or other cause.

5. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

6. *Chater v. San Francisco etc. Refining Co.*, 19 Cal. 219.

7. *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14.

8. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237 (holding, however, that under the act of April 22, 1850, concerning corporations, railroad corporations could not issue certificates of stock until they were paid for in full). See *supra*, § 157.

The act provides the procedure for obtaining the assent of the stockholders to such an issue at a special meeting called for the purpose pursuant to section 359 of the Civil Code, and also the procedure which must be followed by any dissenting stockholder or stockholders in case he or they oppose the issue. Any issue of stock under the act is, of course, subject to the Corporate Securities Act.⁹

§ 309. Stock Issued for Check or Note.—Where a statute requires payment of a certain amount of stock in cash as a condition precedent to the commencement of business, it has been held that payment by check on a bank in which the drawer has no funds, despite the fact that the check would have been paid if presented, is not a payment in cash.¹⁰ But where a check is accepted by the treasurer of the corporation, the check being drawn in good faith and there being sufficient funds and the bank being willing to pay, this is a payment in cash.¹¹ A promissory note, being property, may be received for stock.¹² Such a note is not void even though there is a statute prohibiting a note from being treated or computed as any part of the actually paid in capital;¹³ and it is not void under section 359 of the Civil Code, since it is personal property actually received by the corporation.¹⁴ Likewise, the agreement of a corporation to deliver stock is sufficient consideration

9. Stats. 1921, p. 32. See *supra*, § 147 et seq., as to calling special meetings under the requirements of section 359 of the Civil Code; and see *supra*, § 183, as to the Investment Securities Act.

10. *People v. Chambers*, 42 Cal. 201 (under act of May 20, 1861, Stats. 1861, p. 607, providing for the incorporation of railroad companies).

11. *People v. Stockton etc. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178. See *Majors v. Girdner*, 31 Cal. App. 47, 159 Pac. 826, holding that

where a note is given in consideration, there is a completed sale of the stock.

12. *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49; *Quartz Glass etc. Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648. See *Herron v. Gear*, 26 Cal. App. 18, 145 Pac. 731 (action on note given in part payment for stock).

13. *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49. See *BANKS*, vol. 4, p. 136, note 20.

14. *Quartz Glass etc. Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648.

for a promissory note.¹⁵ While section 359 of the Civil Code renders void a certificate of stock issued upon credit, that code provision is not construed as rendering void a condition as to the payment of a non-negotiable note given therefor.¹⁶ But where a subscription is made and the note given therefor contains a condition which amounts to a gift of the stock, as where the note is to be paid only from dividends, such a condition is void as a fraud upon stockholders and creditors and the note is enforceable free from such condition.¹⁷

§ 310. Stock Issued as a Bonus.—While the word “bonus” may, in its natural import, be said to imply a gift or gratuity, bonus stock, technically, and perhaps correctly speaking, is stock issued to the purchasers of bonds as an inducement to them to purchase bonds from or to loan money to the corporation. If it is necessary to the negotiation of bonds or to induce a loan to give a bonus in the stock, it cannot be considered in the light of a mere donation. Where so given, it cannot be held to be void or even voidable, and it is a perfectly valid transaction under the provisions of the constitution.¹⁸ The subscriber in such case is entitled to have the actual consideration for which the stock was taken ascertained and applied to his subscription, as a payment in whole or in part of his liability thereon, and creditors are only entitled, at the most, to have access to whatever balance of the subscrip-

15. *Ballou v. Avery*, 175 Cal. 641, 166 Pac. 1003; *Brainerd v. Kydd*, 26 Cal. App. 655, 148 Pac. 221. See *Williams v. Parker*, 30 Cal. App. 71, 157 Pac. 550, holding that it is no defense to a note given for stock that stockholders and proposed directors in the corporation for whose stock the note was given, speaking individually for themselves, favored corporate action to be taken for the dissolution of the

corporation for the purpose of controlling actions to be taken for the collection of such notes.

16. *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638. See *supra*, § 170, as to conditional subscriptions.

17. *Quartz Glass etc. Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648.

18. *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190, per Hart, J.

tion remained unpaid in order to realize upon their claims.¹⁹ It is incumbent, therefore, upon the trial court in such a case, to find what actual value, if any, the stock had, and what actual consideration, if any, existed for its issuance and transfer.²⁰ And where the full amount of stock is paid, but bonds are given as a bonus, notwithstanding it was a scheme to make the stock appear paid-up, there is a valuable consideration for both stock and bonds.¹ It has been said to be a matter of common knowledge that stock bonuses have been usual with bond issues, which has brought about a condition wherein the issued stock represents nothing except a voting privilege.²

Persons Liable.

§ 311. **Original Subscribers.**—Generally speaking, one must be a stockholder in order to be held liable for unpaid subscriptions. However, where there is an express contract of subscription, binding the subscriber to pay the amount thereof, the obligation arises from the express agreement and is not implied from the subscriber becoming a stockholder.³ The action to recover unpaid subscriptions in such a case is not to enforce an assessment, but to enforce a contract according to its terms.⁴ The

19. *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000.

20. *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000; *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

1. *McKee v. Title Ins. etc. Co.*, 159 Cal. 206, 113 Pac. 140.

2. *In re Application Northern California Power Co.*, 1 Cal. Railroad Com. Dec. 315.

3. *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; *West v. Crawford*, 80 Cal. 19, 21

Pac. 1123; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

If the subscription has not been rescinded or released, the subscriber is liable thereon, for the unpaid balance due, to a creditor of the corporation; *Barnard v. McIntire*, 31 Cal. App. Dec. 51, 187 Pac. 440. See *Cordes v. Hammond*, 36 Cal. App. Dec. 589, where the evidence failed to show that some of the appellants were subscribers to stock in the corporation.

4. *Horseshoe Pier etc. Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308;

liability of stockholders at the date of filing the articles is limited to those named in the articles and to the amounts therein mentioned.⁵ And a subscriber to the articles is liable for the amount set out therein, even though he has received no stock,⁶ and although no certificate has been issued.⁷ But where there is a subscription agreement and the action is upon it, the fact that the subscriber's name did not appear in the articles is immaterial.⁸ If one becomes a stockholder, he is liable for the unpaid balance like other stockholders, despite facts which possibly would have been a defense on the subscription contract.⁹ And if one is a bona fide stockholder and a holder of bona fide stock, it is immaterial whether he can be considered as an original subscriber or not.¹⁰

§ 312. Record Holders of Stock.—As heretofore stated, the holders of partially paid-up stock are responsible to the corporation upon call, and to creditors of the corporation for the unpaid balance of the par value of their stock.¹¹ One in whose name stock stands upon the books

Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; Marysville etc. Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

5. Monterey etc. R. Co. v. Hildreth, 63 Cal. 123.

6. Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136.

7. Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 Pac. 838; Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542; San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

8. Horseshoe Pier etc. Co. v. Sib-

ley, 157 Cal. 442, 108 Pac. 308. See Marysville Elec. Light etc. Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126, where the complaint did not show on its face that the articles failed to name defendant as subscriber, it is not demurrable as insufficient because of that fact.

9. Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136.

See note, 6 A. L. R. 1116, as to right of subscriber to defeat liability on ground of failure to comply with statutory requirement of payment at the time of subscribing.

10. Tulare Sav. Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

11. See supra, § 297.

as owner is liable for unpaid subscriptions,¹² though in fact but a pledgee, agent or trustee of the real owner.¹³ But where a stockholder makes an absolute transfer in good faith, and the transfer is duly recorded on the books, he is thereby wholly discharged from all further liability upon the uncalled subscription price.¹⁴ The registered owner alone is liable until the transferee causes the transfer to be entered upon the books or in some other way establishes the relationship of stockholder between himself and the company, and is thus accepted by the company as substituted for the original holder.¹⁵ While a transfer of the stock on the books renders the transferee liable to the corporation for unpaid subscriptions, even though the transfer may not be in accordance with the by-laws,¹⁶ yet in considering the rights of a creditor, the stockholder remains liable in the absence of a proper transfer.¹⁷

§ 313. Liability of Transferee in General.—By the transfer of stock and the acceptance of certificates issued to him therefor, a transferee assumes the same liability to the corporation for the unpaid amount thereon that his assignor was under.¹⁸ But it is necessary to the trans-

12. *McCarty v. More*, 181 Cal. 738, 186 Pac. 140; *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

13. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329 (pledgee). See *supra*, § 219 et seq.

14. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457; *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280. See note 7 Cal. Law

Rev., p. 61. See *infra*, § 313, as to liability of the transferee.

15. *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280 (holding that the mere fact that the distributee of an estate takes the paper certificate and does nothing more cannot be said to effect a transfer so as to alter the liability).

16. *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

17. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799.

18. *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30

ferree's acceptance of liability that the transfer was with his knowledge and consent.¹⁹ The obligation of the original subscriber, however, is not assumed, for that obligation ceases by an absolute transfer in good faith, recorded on the books. The liability of the transferee arises out of the transfer on the books. If the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privity with the company by having the stock transferred to him on the books, is equally liable. Being thus liable, there is an implied promise that he will pay calls made while he continues to be the owner.²⁰ Although the personal liability of a decedent is barred by failure to present a claim against his estate for the unpaid subscription,¹ yet by having a transfer recorded on the books, the distributee of the stock becomes personally liable on all calls subsequently made, to the

L. R. A. (N. S.) 283, 108 Pac. 711 (where it appeared from the books that the stock had not been fully paid); *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136; *Craig v. Hesperia etc. Water Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10; *Visalia etc. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; *Stockton etc. Agr. Works v. Houser*, 109 Cal. 1, 41 Pac. 809 (where there is no indorsement on the certificate that the stock is fully paid or non-assessable, it must be presumed that it was received and held by a transferee subject to the same conditions and liabilities that it would have been subject to if he had been an original subscriber for it, or had purchased it from an original

subscriber); *Lankershin Ranch etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134; *Zierath v. Glaggett*, 31 Cal. App. Dec. 406, 188 Pac. 837; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

See note, 12 A. L. R. 449, as to liability as on unpaid subscription, of transferees of stock issued in exchange for property or services at an overvaluation.

19. *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057.

20. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457.

1. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457; *Union Sav. Bank v. De Laveaga*, 150 Cal. 395, 89 Pac. 84. See EXECUTORS AND ADMINISTRATORS.

amount of the unpaid subscription.² The liability which attached to the subscriber by virtue of his subscription is inseparable from the ownership of the stock, and it is, therefore, immaterial whether one be an original subscriber for shares or a transferee.³

§ 314. Transferee of "Watered" Stock.—There is a marked difference between the case of one acquiring and accepting stock which is only partially paid and does not purport to be otherwise, and the case of one acquiring and accepting stock which purports to be fully paid, but is not in fact, in other words, what is commonly known as "watered" stock. While one who accepts partially paid stock which does not purport to be anything else, does so upon the understanding that as owner he must respond to a call for the unpaid balance until the stock is fully paid up,⁴ where one accepts ownership of stock purporting to be fully paid, it cannot be said that he accepts the stock upon any such understanding. And one who is only a transferee of watered stock and did not participate in the transaction whereby it was originally issued, and who took unaware of the character of that transaction, cannot be compelled to make good the false representation as to the capital of the company which he had no part in making, and the responsibility for which he has done nothing to assume.⁵ This is now the established rule in California.⁶

2. Geary St. etc. R. Co. v. Bradbury Estate Co., 179 Cal. 46, 175 Pac. 457.

3. Union Sav. Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098.

4. See supra, § 297 et seq.

5. Rhode v. Dock-Hop Co., 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11 (distinguishing cases). See Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166, as to rights of purchasers from original subscribers, the presumption, if any, arising

from issuance of certificate of stock, is that the stock is fully paid for.

6. Jose v. Utley, 61 Cal. Dec. 589, 199 Pac. 1037; Sherman v. S. K. D. Oil Co., 61 Cal. Dec. 515, 197 Pac. 799; Rhode v. Dock-Hop Co., 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11; California Nat. Supply Co. v. Dinsmore, 35 Cal. App. Dec. 93, 199 Pac. 552; California Nat. Supply Co. v. O'Brien, 34 Cal. App. Dec. 688, 197 Pac. 414 (holding

However, transferees of watered stock are held to assume the unpaid portion of the subscription price when it appears that they accepted the stock with knowledge or notice of the transaction whereby it was issued, and such guilty knowledge is essential to bind the purchaser to respond to an equitable call on behalf of creditors.⁷ As to whether the transferor might be held liable, in case the innocent transferee cannot be held, has not been decided.⁸

§ 315. Proof of Participation or Guilty Knowledge.—The burden does not rest upon a transferee of watered stock to allege and prove that he did not acquire it under circumstances such as would make him liable.⁹ It does not follow that merely by virtue of the transfer he was fairly chargeable with knowledge of the fraudulent transaction whereby the stock issued as fully paid was issued in exchange for the overvalued property.¹⁰ Where, therefore, there are no allegations, admissions or findings that such transferee participated in the original transaction or that he received the stock with knowledge thereof, he cannot be compelled to make good the false representation which he had no part in making and the responsibil-

defendants there to be within the reason of the rule).

7. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11; *Andrews v. Panama Oil Co.*, 34 Cal. App. Dec. 245, 195 Pac. 963.

8. But see *Jose v. Utley*, 61 Cal. Dec. 589, 199 Pac. 1037, where in an action to enjoin a prosecution under the Corporate Securities Act for failure to secure a permit for sale of watered stock, the court said: "It is proposed to issue stock to purchasers who pay therefor only ten cents, as fully paid up. Under our decisions, if the purchaser is aware of the initial trans-

action he would be liable to the corporation for the difference between the value of the property conveyed for the stock and the amount of stock issued therefor, pro rata; if he was not, plaintiffs would be liable therefor." (Citing *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799.)

9. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11; *Ryan v. Jacques*, 103 Cal. 280, 37 Pac. 186; *Andrews v. Panama Oil Co.*, 34 Cal. App. Dec. 245, 195 Pac. 963.

10. *California Nat. Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414.

ity for which he has done nothing to assume.¹¹ Any other rule, it has been argued, would subject a prospective purchaser of stock to unjust hardship. He would not be permitted to rely upon the records, but would be required to investigate the bona fides of all previous transactions, and, in addition, have an appraisal of the company's property at the time of its acquisition, under penalty of assuming to pay any difference between the value of the property and the stock issued in payment therefor whenever demanded by creditors.¹² But where the stockholder was one of the directors at the time of the transaction, he may be held liable.¹³

It is immaterial in the application of the rule that the transferee is not a purchaser for value, for in such a case the doctrine of bona fide purchasers for value has no application. That doctrine is always one applied to protect one who has acquired property against some equitable charge, while the action against a stockholder is one to compel him to make good a false representation in fraud of the creditor, that is, a suit merely to enforce a personal liability, not a lien or claim against the stock. The mere fact that the stock was received as a gratuity, therefore, does not show that the transferee had participated in the making of the false representation or in any manner assumed responsibility for it.¹⁴ Nor, it is said, is there any real distinction between one who takes from the original holder stock not fully paid and one who acquired it by purchase from the company; in either case, before the transferee can be held liable to a creditor, it must be

11. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799; *California Nat. Supply Co. v. Dinmore*, 35 Cal. App. Dec. 93, 199 Pac. 552.

12. *Andrews v. Panama Oil Co.*, 34 Cal. App. Dec. 245, 195 Pac. 963, per *Weller, J.*

13. *California Nat. Supply Co. v. O'Brien*, 34 Cal. App. Dec. 688, 197 Pac. 414,

14. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11, per *Olney, J.*

shown that he participated in the original transaction or received the stock with knowledge thereof.¹⁵

§ 316. Insolvent Transferee.—So long as a corporation is solvent, there is ordinarily no restriction upon the right to transfer stock, but if the corporation has become insolvent and the stockholder knows this, and especially if the corporation has ceased to do business, the shareholder cannot transfer his stock to relieve himself from liability.¹⁶ In such case his liability continues notwithstanding such transfer,¹⁷ the reason for the rule being that such a transaction would be a fraud upon creditors of the corporation and other shareholders.¹⁸ Nor can a corporation, after insolvency, relieve stockholders of their liability by conversion of the stock by refusing to transfer it on the books, whatever may be the motive which induced such conversion;¹⁹ and the mere fact that the directors accept an insolvent transferee as a stockholder will not defeat any existent claim against the solvent

15. *California Nat. Supply Co. v. Dinsmore*, 35 Cal. App. Dec. 93, 199 Pac. 552.

16. *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *National Carriage Mfg. Co. v. Story etc. Co.*, 111 Cal. 531, 44 Pac. 157 (the transfer is not in good faith if made after insolvency, simply with a view of escaping liability and where there is no real sale of the stock); *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858 (where the stockholder in an insolvent corporation, knowing that it was insolvent, transferred his stock to an insolvent person, knowing him to be insolvent, for the purpose of relieving himself from liability).

17. *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *Wilkinson v. Grant*, 31 Cal. App. Dec. 674, 189 Pac. 319. See *Peo-*

ple's Home Savings Bank v. Sherman, 150 Cal. 793, 90 Pac. 133, which was an action against a stockholder who, when the corporation was insolvent, transferred his stock to another without consideration, which stock was held by the other in trust for defendant, but where the company continued to do business for three years after the officers knew of the insolvency without questioning the transfer. It was held that the case was properly dismissed for want of prosecution.

18. *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *National Carriage Mfg. Co. v. Story etc. Co.*, 111 Cal. 531, 44 Pac. 157.

19. *National Carriage Mfg. Co. v. Story etc. Co.*, 111 Cal. 531, 44 Pac. 157.

transferor for an unpaid subscription.²⁰ When a corporation has shown a transfer to an irresponsible person, it has made out a prima facie case, and the burden is then on the transferor to show facts relieving him of liability, such as a subsequent transfer to a responsible person.¹

Enforcement of Liability.

§ 317. In General—Distinguished from Stockholder's Liability.—The liability of stockholders for amounts unpaid upon their stock is not, of course, the same as the statutory liability of stockholders for debts of the corporation under section 322 of the Civil Code. The statutory liability is concurrent with the liability for unpaid stock.² The remedy given by the code furnishes to creditors additional security and was not intended to diminish the assets of the corporation by releasing stockholders from indebtedness on account of unpaid subscription,³ or to take away from creditors the right to resort to a court of equity to compel payment.⁴ The liability for unpaid balances on the par value of stock is to the corporation, and the rights of a creditor to recover on that liability come to him through the corporation. The general principle is that these rights cannot be other or greater than those of the corporation debtor. In this the situation differs from

20. *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

1. *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

2. *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 71 Am. St. Rep. 36, 45 L. R. A. 863, 56 Pac. 787; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Harmon v. Page*, 62 Cal. 448. See *infra*, § 367 et seq., as to stockholder's liability under Civ. Code, § 322.

3. *Baines v. Babcock*, 95 Cal.

581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

4. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Hiller v. Collins*, 63 Cal. 235; *Harmon v. Page*, 62 Cal. 448.

An unsuccessful action on the stockholder's statutory liability will not sustain a plea of *res judicata* to the action to enforce the liability for unpaid subscriptions; *McCarty v. More*, 181 Cal. 738, 186 Pac. 140.

that of the statutory liability, where the direct relation of debtor and creditor is established by the statute, between stockholders and creditors. There are exceptions, or apparent exceptions, however, to this general principle in cases of fraud, actual or constructive, as to creditors, and there are cases where stockholders may be estopped from showing the real nature of the contract or agreement between them and the corporation.⁵ The foundation of the liability for unpaid balances is the stockholder's contract to pay,⁶ and the liability is one upon a contract "for the direct payment of money," on which an attachment will lie.⁷ The contract from which the liability arises may, of course, be an express contract of subscription, but, in the absence of this, it arises by virtue of the contract of membership in the corporation evidenced by the certificate for shares.⁸

§ 318. Enforcement of Subscription Contract by Corporation.—A subscriber for stock may, by the terms of his subscription, vary his liability from that which exists merely by virtue of the statute, but, as in the case of all other obligations arising from contract, the liability in such cases is measured by the terms of his agreement.⁹

5. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70, per Smith, J.

6. *San Bernardino County Sav. Bank v. Denman*, 62 Cal. Dec. 240, 200 Pac. 606; *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420.

7. *Flagg v. Dare*, 107 Cal. 482, 40 Pac. 804; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Agassiz v. Superior Court*, 90 Cal. 101, 27 Pac. 49; *Lankershin Ranch etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134. See ATTACHMENT, vol. 3, p. 416, as to the principle generally.

8. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175

Pac. 457; *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Agassiz v. Superior Court*, 90 Cal. 101, 27 Pac. 49; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

9. *Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308; *Ventura & O. V. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65 (reversing as to construction of contract, *Ventura etc. R. Co. v. Collins*, 5 Cal. Unrep. 469, 46 Pac. 287, 48 Pac. 1115); *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *California Southern Hotel*

Accordingly, a contract by a subscriber to the stock of a proposed corporation to pay the amount of his subscription upon the formation of the company and the issuance of its stock may be enforced regardless of the inability of the corporation to meet its liabilities or to satisfy the claims of creditors. Such a contract is valid¹⁰ and effects a waiver of the stockholder's right to insist that the corporation shall levy assessments as provided in section 322 of the Civil Code, and so may be enforced by the corporation according to its terms.¹¹ In a case where assessments were irregularly made, it has been held that if the subscriber is nevertheless liable for the amounts by a subscription agreement, the defects in levying the purported assessments are not a defense to an action.¹²

§ 319. Enforcement by Assessment.—The sections of the Civil Code declaring under what circumstances, for what purposes and how the directors may levy assessments and the methods which may be pursued in collecting them, enter into and become a part of the stockholder's contract with the corporation.¹³ However, it is permissible for the

Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; Auburn Opera House etc. Assn. v. Hill, 3 Cal. Unrep. 839, 32 Pac. 587.

10. Marysville etc. Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

11. Marysville etc. Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126; People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

The fact that the corporation when organized cannot levy an assessment of more than ten per cent does not prevent the collection of the agreed amount by virtue of the contract of the parties; West v. Crawford, 80 Cal. 19, 21 Pac. 1123.

12. Beedy v. San Mateo Hotel Co., 27 Cal. App. 653, 150 Pac. 810, where the subscriber signed a supplementary subscription agreement which did not provide for the manner of payment, but which referred to the original agreement which provided that subscriptions should be payable upon calls made by the directors.

13. Kaye v. Metz, 61 Cal. Dec. 728, 198 Pac. 1047; Los Angeles Athletic Club v. Spires, 166 Cal. 173, 135 Pac. 298; Marshall v. Wentz, 28 Cal. App. 540, 153 Pac. 244. See note, 1 Cal. Law Rev. 372. And see *infra*, § 333 et seq.

As to assessments and calls generally, see *infra*, §§ 333-366.

subscriber to waive the provisions of the code which are clearly designed for his benefit.¹⁴ But unless he has so waived or modified the provisions, he will be held to have entered into the subscription contract in contemplation of the protection which the code provisions afford him;¹⁵ and in such case the directors in making their calls upon him are governed by the procedure outlined in the statute.¹⁶ In general, assessment is the proper method to collect unpaid subscriptions.¹⁷ And where the provisions of the code are applicable, the liability of subscribers begins only when one-fourth of the stock is subscribed.¹⁸ The levy in such cases must not exceed ten per cent of the

14. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298; *San Bernardino County Sav. Bank v. Denman*, 62 Cal. Dec. 240, 200 Pac. 606, saying that the rule that a call may be waived and payment made at any time is a settled principle of the law of corporations, although such advance payments are so infrequent that the question does not often arise. And see *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441, as to validity of a by-law requiring a two-thirds vote of stockholders before making calls, the court construing it to be ineffective as to assessments, and applicable only to such calls for unpaid capital as might, in the absence of contrary stipulation, be made by directors by simple resolution. See Civ. Code, § 331 et seq. And see *supra*, § 318, as to enforcement of subscription by corporation.

15. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298; *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396.

16. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298;

Bell Dev. Co. v. Marshall, 35 Cal. App. 324, 169 Pac. 717 (holding that suits cannot be commenced until the statutory procedure has been exhausted, and the complaint must show that the procedure has been followed); *Imperial Land & S. Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

17. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Union Sav. Bank v. Dunlap*, 135 Cal. 628, 67 Pac. 1084; *Ventura etc. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741. As to the levying and collection of assessments, see *infra*, §§ 351-362.

18. See Civ. Code, § 331; *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136; *Ventura etc. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65. But see *McCarty v. More*, 181 Cal. 738, 186 Pac. 140, where the obligation of the subscriber was fixed by the Nevada law, the corporation having been incorporated under the laws of that state.

capital stock, but if necessary to meet the liabilities of the corporation or to satisfy the claims of creditors, the levy may be for the full amount unpaid, even though it exceeds ten per cent, or for the percentage necessary to raise a sufficient amount.¹⁹

§ 320. Remedy of Creditor in General.—A creditor of an insolvent corporation, who holds a judgment against the corporation and has exhausted his legal remedies to collect his debt, may maintain an action in equity against a stockholder who is indebted upon an unpaid stock subscription.²⁰ Creditors may avail themselves of this liability of the stockholder as of any other chose in action or equitable asset of the corporation.¹ But, pursuant to the rule that the creditor must stand in the shoes of the

19. Civ. Code, § 332; *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802.

20. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Kelley v. Abbott*, 61 Cal. Dec. 260, 196 Pac. 39; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915A, 1265, 133 Pac. 488; *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136; *Harmon v. Page*, 62 Cal. 448; *California Nat. Supply Co. v. Black*, 32 Cal. App. Dec. 525, 191 Pac. 715; *Zierath v. Claggett*, 31 Cal. App. Dec. 406, 188 Pac. 837. See *Union Collection Co. v. Superior Court*, 149 Cal. 790, 87 Pac. 1035, holding that in a creditor's bill to reach unpaid subscriptions, a pro-

ceeding to compel one of many stockholders defendant to testify to or discover the whereabouts of other defendants to enable plaintiff to serve them was untenable and without jurisdiction.

See note, 7 A. L. R. 100, as to right of creditor of insolvent corporation to sue stockholder at law upon unpaid subscription.

See note, 9 A. L. R. 1447, as to right of creditors as against directors or officers to whom property of a corporation has been transferred for a consideration other than payment of debts due them.

See note, 7 A. L. R. 972, as to creditor's knowledge that stock is unpaid as affecting stockholder's liability.

1. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776 (holding that the equitable remedy of the stockholder is not superseded by section 322 of the Civil Code); *Harmon v. Page*, 62 Cal. 448.

debtor, he can reach no assets not belonging to the corporation, and can get no greater relief than his debtor could, to this extent; thus, he cannot force payment from one who is not the debtor of the corporation, and if the liability which once existed has been lawfully paid before the proceeding on a creditor's bill, the bill must fail.² The fact that stock has been issued as fully paid up does not estop the creditor if such is not the fact.³ If the subscriber had purchased his stock under such circumstances as to relieve him from liability for the amount unpaid, this is a matter of defense to be pleaded and proved by him and the creditor is not bound to anticipate and negative such defense.⁴

§ 321. Call by Corporation as Condition to Creditor's Suit.—Where a solvent corporation finds it necessary in the course of its business to call in additional subscribed capital and the subscription agreements do not state when, in what amount and upon what conditions it is to be paid, the statute (being the measure of the corporate rights in that regard) must be followed, for the call is a necessary condition precedent to the existence of a cause of action by the corporation to recover upon its subscriptions.⁵ But this rule has no application to a proceeding in equity by a judgment creditor to subject unpaid subscriptions to the satisfaction of his judgment. The shareholders of an insolvent corporation are held to be unconditionally liable to creditors to contribute the amount of unpaid capital stock subscribed by them, although their subscriptions were conditional as between themselves and the corporation upon a regular call or assessment by the

2. San Bernardino County Sav. Bank v. Denman, 62 Cal. Dec. 240, 200 Pac. 606.

3. California Nat. Supply Co. v. Black, 32 Cal. App. Dec. 525, 191 Pac. 715. See *supra*, § 300.

4. Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186. See, however, *supra*, § 315.

5. Daggett v. Southwest Packing Co., 155 Cal. 762, 103 Pac. 204. See *supra*, § 319.

board of directors.⁶ No previous call need be shown by the creditor,⁷ nor need he show that he has endeavored to induce the corporation to make a call as a prerequisite to his suit in equity.⁸ The reason for this rule is that the enforcement of a call by suit would be no greater burden upon the stockholders when begun at the instance of a creditor of the corporation than if begun by the corporation itself; and consequently it is held that when the corporation is insolvent and the directors neglect or refuse to make a call, equity will disregard the formality of a call and will order unpaid subscriptions to be paid to a receiver for the benefit of creditors.⁹ But, it has been said, conceding the necessity of an assessment or call of some character, the only effect would be that the court, after obtaining jurisdiction would have authority to make whatever call the law required and could thereupon order stockholders to pay into court such amount as it should find necessary to satisfy the demands of creditors.¹⁰

6. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047; *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204. See *supra*, § 318, as to the unconditional nature of the liability.

7. *San Bernardino County Sav. Bank v. Denman*, 62 Cal. Dec. 240, 300 Pac. 606 (to the effect that although equity has gone so far as to hold that the creditor may compel payment without a previous call by the corporation, yet it has gone no further and cannot disregard or refuse to credit payments made in good faith by stockholders without call); *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047; *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776;

Potter v. Dear, 95 Cal. 578, 30 Pac. 777. And see cases cited *infra* this section, and *infra*, §§ 322, 323.

8. *McCarty v. More*, 181 Cal. 738, 186 Pac. 140; *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204. See *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70, *contra*, which is not a decision on the point, since only two judges of the district court of appeal concurred in that portion of the opinion and consequently such portion does not constitute the law of the case, as indicated by the opinion of the supreme court in denying a petition to have the cause heard in the supreme court.

9. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319.

10. *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *Kimball v. Richardson-Kimball Co.*,

§ 322. Exhausting Legal Remedies Against Corporation.

It is not necessary that a creditor exhaust his remedies against the stockholders before proceeding, by action, to collect upon their liability for unpaid subscriptions, and it is not necessary to show that he has pursued his statutory remedy.¹¹ But the action in equity may be brought by judgment creditors only after they have exhausted their legal remedies against the corporation by the issue of execution and a return thereof *nulla bona*.¹² But where the corporation is shown to have been insolvent at the time of judgment and at all times since, it is not necessary for execution to be returned *nulla bona*.¹³ A creditor with securities need not surrender them for the benefit of other creditors, but he may be compelled to exhaust his security and can

111 Cal. 386, 43 Pac. 1111 (a court of equity for the purpose of meeting the obligations of the corporation could enforce liability either by direct levy or by requiring the directors of the corporation to make the levy); *Hunt v. Sharkey*, 20 Cal. App. 690, 130 Pac. 21 (holding that where a corporation is adjudged a bankrupt the trustee of the bankrupt estate cannot enforce payment of the stockholder's liability upon unpaid subscriptions for capital stock, unless it be made to appear by allegation and proof that an assessment has been made by the proper court); *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

11. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777.

12. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776;

Potter v. Dear, 95 Cal. 578, 30 Pac. 777; *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136; *Cordes v. Hammond*, 36 Cal. App. Dec. 589. See *infra*, § 331, as to accrual of right of action.

The return shows whether the remedy has proved effectual or not and from the embarrassments which would attend any other rule the return is held conclusive; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776. See *Cordes v. Hammond*, 36 Cal. App. Dec. 589, holding a return insufficient as failing to comply with the provisions of section 683 of the Code of Civil Procedure, directing that no return on an execution may be made in less than ten days nor more than sixty days after its receipt by the sheriff.

13. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799; *Cordes v. Hammond*, 36 Cal. App. Dec. 589; *Merchants' Mut. Adj. Agency v. Davidson*, 23 Cal. App. 274, 137 Pac. 1091. See note, 2 Cal. Law Rev., p. 237.

share ratably with other creditors only for the balance of his debt remaining unpaid thereafter.¹⁴

§ 323. Creditor as a Judgment Creditor.—When a judgment is rendered against a corporation in favor of a creditor, it establishes conclusively the liability of the corporation to pay the debt, so far as any judgment can. It concludes stockholders, who are in privity with the corporation, and is valid until reversed in a direct proceeding.¹⁵ Stockholders cannot go behind the judgment unless they can show collusion between the corporation and the plaintiff, entered into for the purpose of defrauding them.¹⁶ Hence, it is not necessary in an ordinary action by a judgment creditor against a stockholder to allege that the judgment is founded upon a valid and subsisting debt.¹⁷ If the creditor recovers a judgment prior to dissolution of the corporation, he is a judgment creditor.¹⁸ And it is a rule that although judgment creditors may intervene in an action by other judgment creditors against stockholders, mere creditors at large are not entitled to relief in an action commenced by and on behalf of judgment creditors only; and even then the creditors contemplated in such an action are only such as are judgment creditors at the time judgment is entered therein. However, a com-

14. *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319. See PLEDGE.

15. *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136. See *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335 (distinguishing the stockholder's statutory liability).

16. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

17. *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

It is generally stated by the cases that actions to enforce a stockholder's liability for unpaid subscriptions are actions by judgment creditors, this requirement probably being but a corollary of the rule requiring the creditor to exhaust his legal remedies. See *supra*, §§ 320, 322.

18. *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258, holding that the subsequent accruing of grounds of forfeiture of the charter cannot affect the judgment creditor's right.

plaint filed by a creditor in intervention may be regarded as an original bill where he subsequently obtains judgment.¹⁹ Equity is adverse to favoring one creditor over another where, in actuality, they are of the same class.²⁰ The rule is stated that after actual insolvency, unpaid capital becomes a trust fund, to reach which creditors are not required first to reduce their claims to judgment.¹

§ 324. Parties Plaintiff.— Ordinarily, in creditors' actions, the bill is brought for the benefit of all creditors who choose to come in,² and the fund realized from the suit is distributed ratably among all creditors.³ The fund realized from the payments by the subscribers to the capital stock is, in equity, equally a fund belonging to all creditors, and in the distribution of it, if it appears to the court that there are other creditors than those instituting the suit, it is its duty to distribute to them their pro rata share. This rule proceeds upon the theory that no one creditor can secure payment of his debt to the exclusion of other creditors.⁴ And a complaint should not be held bad on general demurrer because of failure to allege that it is filed for the benefit of all creditors.⁵ Although the question as to whether a creditor can recover for the benefit of himself alone or whether he can recover only by a creditor's bill for the benefit of all creditors who choose to join with him, as a matter of first impression, would not seem to be free from doubt,⁶ nevertheless, it has been held

19. *Baines v. West Coast Lumber Co.*, 104 Cal. 1, 37 Pac. 767.

20. See *infra*, § 324.

1. *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 43 Pac. 1111, an insolvent stockholder whose liability to the corporation exceeds his claim against it, will not be permitted to enforce his individual claim against the corporation to the exclusion of the other creditors.

2. *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319.

3. *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319. See *infra*, § 326.

4. *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

5. *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136, holding that the objection, if such it be, should be raised by special demurrer.

6. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 L. R. A. 437, 194 Pac. 11.

that where a distribution must be made to all the creditors, a single creditor may begin the action and the decree will be for the benefit of all.⁷ An assignee of a creditor becomes a creditor, of course, and may enforce the liability of the stockholders,⁸ and the indorser of a note of the corporation, to the extent of payment made by him, is an ordinary creditor of the corporation and may share ratably with other creditors.⁹ The rule prevails in California that a creditor of a corporation who is himself a stockholder, and liable for unpaid subscriptions, may, without fully paying his own subscription, maintain an action against other delinquent stockholders to enforce payment of a judgment obtained by him against the corporation.¹⁰

§ 325. Parties Defendant.—The liability of stockholders upon unpaid subscriptions is several and not joint;¹¹ hence, an action by a creditor to secure satisfaction of his judgment may be against a single stockholder or against any number of them,¹² although the presence of all may be convenient.¹³ It is not necessary that stockholders

7. *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136; *Harmon v. Page*, 62 Cal. 448.

8. *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

9. *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319.

10. *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090.

11. *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Barnard v. McIntire*, 31 Cal. App. Dec. 51, 187 Pac. 440.

12. *Kaye v. Metz*, 61 Cal. Dec.

728, 198 Pac. 1047; *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777.

13. *Kelley v. Abbott*, 61 Cal. Dec. 260, 196 Pac. 39; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

There is no misjoinder either of parties or causes of action where several stockholders are joined as defendants; *Kelley v. Abbott*, 61 Cal. Dec. 260, 196 Pac. 39; *Ryan v. Jacques*, 103 Cal. 280, 37 Pac.

186.

standing in exactly the same position be made parties.¹⁴ Since the action is primarily against the stockholders,¹⁵ and although the corporation should be joined, it is not an indispensable party,¹⁶ unless the object of the action is to secure a final settlement of the affairs of the company and an adjudication of the rights of all parties.¹⁷

§ 326. Recovery by Creditor.—Corporate creditors compelling stockholders to pay their subscriptions are under no obligation to see that the payments made are proportionately equal. If any balance should remain in the hands of the receiver, after satisfying the debts of the corporation, and the necessary expenses of executing the trust, it will be distributed among the several stockholders who shall have paid in full for their stock, so as to produce equality among them.¹⁸ A creditor is not limited in his recovery to the amount represented by the proportion which the defendants' unpaid subscription bears to all unpaid subscriptions. He may sue any one stockholder and recover from him his total debt, provided it does not exceed the amount of the defendant's subscription liability.¹⁹ A bankruptcy court should not, however,

14. *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 12 A. L. R. 437, 194 Pac. 11; *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

15. *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090.

16. *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777 (the objection to nonjoinder of the corporation is waived if it is not raised by demurrer or answer).

17. *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777.

18. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047, per Shaw, J. See *Hunt v. Sharkey*, 20 Cal. App. 690, 130 Pac. 21, where a remark was made that the assessment should be for an amount against each stockholder that would ratably distribute the liability of the bankrupt estate among the subscribers to the stock, which remark was wholly unnecessary to the decision since no assessment had been made. (See comment, in *Kaye v. Metz*, supra.)

19. *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *Walter v. Merced*

by the sale of the subscription agreements, subject a stockholder to a liability for his full subscription by selling the same outright to a purchaser at public auction and allow the purchaser to sue for the full sum regardless of the amount realized by the sale to the benefit of the creditors.²⁰ Where the plaintiff creditor is himself a stockholder, this furnishes a reason for equitably adjusting the liabilities of the parties and the court may apply the debt due the corporation from the plaintiff on his subscription pro rata to the satisfaction of the judgment held by him as a creditor.¹ While in an action by the corporation to recover on an assessment for unpaid subscriptions, its books are admissible to show the amounts paid in,² entry on the minutes of full payment for stock is not conclusive against creditors who are entitled to disclose the true nature of the transaction.³

Discharge or Limitation of Liability.

§ 327. In General.—Under the rule that matters exonerating a holder of stock from liability for unpaid balances of the par value must be pleaded,⁴ where it is alleged that the stock is held by the original subscriber it will not be presumed that he sold the stock to some person who paid the balance due and then sold it back again to the holder.⁵ But where a stockholder makes an absolute transfer in good faith, the transfer being duly recorded on the corporate books, he is thereby wholly discharged from further

Academy Assn., 126 Cal. 582, 59 Pac. 136.

20. Hunt v. Sharkey, 20 Cal. App. 690, 130 Pac. 21.

1. Blood v. La Serena Land etc. Co., 150 Cal. 764, 89 Pac. 1090; Barnard v. McIntire, 31 Cal. App. Dec. 51, 187 Pac. 440.

If it appears to the court that there are other creditors than those instituting the suit, it is the duty of that tribunal to distribute to them

their pro rata share of the fund; Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

2. Geary St. etc. R. Co. v. Campbell, 39 Cal. App. 496, 179 Pac. 453.

3. Home Sav. Bank v. Los Angeles City Realty Co., 176 Cal. 731, 171 Pac. 290.

4. See supra, § 315.

5. Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186.

liability for the uncalled subscription price of the stock, which is assumed by the transferee.⁶ The liability may, of course, be discharged by payment,⁷ or by forfeiture of the stock to the company,⁸ or may be barred by the statute of limitations,⁹ or it may become barred by statutory provisions. Thus, a failure on the part of the corporation or creditor to present the claim against the estate of a deceased stockholder will bar the personal liability of his estate for calls made.¹⁰ It is likewise entirely possible for the creditors of a corporation to waive the liability of stockholders upon unpaid subscriptions. Thus, if bonds contain a provision that they are not payable upon the general credit of the maker but out of a special fund, namely, the corporate assets, and that assets should not embrace claims enforceable by creditors against stockholders, directors or officers by reason of statutory liability or by reason of unpaid subscriptions, the stockholder's liability is thereby waived.¹¹

§ 328. Payment.—Payments to creditors under section 322 of the Civil Code cannot be considered as payments on the capital stock, and do not reduce the liability of stockholders for their unpaid subscriptions.¹² A stockholder may pay to the corporation the amount of his subscription at any time and thus discharge his liability,¹³ and in the absence of fraud a payment to an authorized agent of the corporation of a part or all of the sum owing on a stock subscription is a discharge of that liability and

6. Geary St. etc. R. Co. v. Bradbury Estate Co., 179 Cal. 46, 175 Pac. 457. See *supra*, § 313.

7. See *infra*, § 328.

8. See *infra*, § 330.

9. See *infra*, §§ 331, 332.

10. Geary St. etc. R. Co. v. Bradbury Estate Co., 179 Cal. 46, 175 Pac. 457; Union Sav. Bank v. De

Laveaga, 150 Cal. 395, 89 Pac. 84.

See EXECUTORS AND ADMINISTRATORS.

11. Kohn v. Sacramento etc. R. Co., 168 Cal. 1, 141 Pac. 626.

12. J. F. Lucey Co. v. McMullen, 178 Cal. 425, 173 Pac. 1000; Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

13. Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

binding on creditors of the corporation.¹⁴ But a payment which the accredited officers of the corporation do not authorize or accept is not good as a defense to a creditors' bill against a stockholder.¹⁵ And so a stockholder cannot thus make payment to a creditor in discharge of his liability to the corporation; for if one stockholder could do so, all could do likewise, and the directors would lose control of one of the principal sources of liability.¹⁶ But in the absence of fraud, actual or constructive, the corporation and the stockholder are at liberty to effect a discharge of the liability in any mode they see fit, either in property or in payment of a corporate debt, or in actual cash or its equivalent.¹⁷ Where, after an action is brought on behalf of creditors, the creditor bringing the action accepts from some of the defendants the amount of the judgment obtained against them, he cannot thereafter appeal from the judgment, and such defendants are entitled to have the judgment satisfied. The court cannot compel further payments on a judgment by those parties to the litigation as to whom the case has terminated by the satisfaction.¹⁸

§ 329. Offsets.—Unpaid amounts due on stock subscriptions are assets of the corporation and as such constitute a trust fund to be applied to the payment of its debts in

14. San Bernardino County Sav. Bank v. Denman, 62 Cal. Dec. 240, 200 Pac. 606.

15. San Bernardino County Sav. Bank v. Denman, 62 Cal. Dec. 240, 200 Pac. 606.

16. Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

17. San Bernardino County Sav. Bank v. Denman, 62 Cal. Dec. 240, 200 Pac. 606, saying that there is nothing in Welch v. Sargent, 127 Cal. 72, 59 Pac. 319, to the contrary.

See California Packers Co. v.

Merritt Fruit Co., 6 Cal. App. 507, 92 Pac. 509, holding that since the liability for unpaid subscription was not in the mind of the parties in making a general release and receipt in full of all claims and demands, a claim upon a future call was not included and parol evidence was admissible to show that the settlement did not include and was not intended to include unpaid subscriptions not then due or called for and not mentioned by the parties.

18. Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 Pac. 464.

general.¹⁹ Such amounts belong ratably to all the creditors, and when paid in must be distributed pro rata to all of them. The duty of a trustee is plain, therefore. He must collect the unpaid subscription in full and not allow any creditor to get more than his proportionate share by reason of the fact that the corporation is indebted to him.²⁰ And so, a creditor stockholder must not be allowed to set off his debt against his unpaid stock liability, if thereby he would receive payment in full of his debt, while other creditors would receive a pro rata share only, which itself would be reduced.¹ Thus, an unpaid subscription cannot be appropriated either to the reduction or the payment of a debt owing by the corporation to a delinquent stockholder; and this is true whether there is only one delinquent stockholder or many.² A stockholder who is sued cannot set off, against the claim of the creditor, the liability of the creditor to the corporation.³ However, a stockholder is entitled to have the amount of his proportional liability to the corporation on his own stock deducted from his claim and the balance due him apportioned against the stockholders other than himself,—⁴ his liability to the corporation being applied pro rata to the satisfaction of his judgment against the corporation.⁵

§ 330. Forfeiture of Stock as Discharging Liability.—

It is the rule in California, as between stockholder and the corporation, that the effect of a sale made to meet a delinquency in payment of assessments is to divest the stockholder of all right or interest in his shares, and to

19. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047.

20. *In re La Jolla Lumber etc. Co.*, 243 Fed. 1004.

1. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047.

2. *In re La Jolla Lumber etc. Co.*, 243 Fed. 1004.

3. *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090.

4. *Richardson v. Chicago Packing etc. Co.*, 6 Cal. Unrep. 606, 63 Pac. 74.

5. *Blood v. La Serena Land etc. Co.*, 150 Cal. 764, 89 Pac. 1090; *Barnard v. McIntire*, 31 Cal. App. Dec. 51, 187 Pac. 440.

pass title to the corporation, and that all liability of the stockholder for unpaid balances on the stock is thereby terminated. The right of the creditors to rely upon the liability of the stockholder for unpaid balances is subject therefore, to the power of the corporation to discharge such liability by receiving payment, or, if it be deemed to be for the interest of all concerned, by the forfeiture of the stock.⁶ If a forfeiture is invalid in respect to something which the parties cannot waive and which cannot be cured by their acquiescence, the stockholder remains liable to creditors in the event of the insolvency of the corporation; but where there has been a mere irregularity in making a bona fide forfeiture within the powers of the company, as by failing to give a prescribed notice, if both the company and the shareholder treat the forfeiture as valid, it will be so held against the creditors.⁷ But a corporation cannot, after insolvency, by converting the stock of a shareholder, relieve him of liability thereon, and it matters not what the motive may be which induced the act of conversion.⁸

§ 331. Accrual of Right of Action.—The general rule is that the right of action by a creditor against a stockholder on his liability as holder of unpaid stock does not accrue until judgment has been obtained against the corporation and execution thereon is returned nulla bona. Ordinarily, therefore, a creditor may wait up to four years after the maturity of his promissory note before bringing suit against the corporation, and upon obtaining judgment and return of execution nulla bona, may thereafter bring a bill in equity against the stockholder. The statute of limitations on the latter cause of action would not begin

6. *American Well etc. Co. v. Blakemore*, 184 Cal. 343, 193 Pac. Blakemore, 184 Cal. 343, 193 Pac. 773.

773. See *supra*, § 181, as to cancellation of subscriptions; and *supra*, § 328, as to payment. 8. *National Carriage Mfg. Co. v. Story etc. Co.*, 111 Cal. 531, 44 Pac. 157.

7. *American Well etc. Co. v.*

to run until the return of the execution nulla bona;⁹ and where the action is an equitable one in the nature of a creditor's bill, it is governed by the provisions of section 343 of the Code of Civil Procedure providing for the commencement of the action within four years from the accrual of the right of action.¹⁰ In general, the statute of limitations does not begin to run until a call is made,¹¹ or there is an evident disbandment of the business.¹² But the liability of the stockholder may, under the law applicable thereto, accrue upon the beginning of the status of insolvency.¹³ In any event, the statute of limitations does not begin to run before the obligation of the creditor against the corporation has matured, although the creditor might bring his suit on the ground that the corporation is insolvent, before that time. And after his obligation has matured, there being no assignment and nothing to prevent the creditor from pursuing his legal remedies against the corporation or its trustees, the right of action against stockholders cannot be said to accrue until it is manifest that the corporation or its trustees have not sufficient property subject to attachment to pay the claim in full.¹⁴

§ 332. Statute of Limitations.—Section 359 of the Code of Civil Procedure regulates the time for commencing actions against stockholders to enforce a liability created by law, and provides that the action must be brought within three years after the liability is created.¹⁵ This section, although applicable to an action based upon the

9. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799. See § 322, as to exhausting legal remedies.

10. See *infra*, § 332.

11. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047; *Miller v. Lane*, 160 Cal. 90, 116 Pac. 58; *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Harmon v. Page*, 62 Cal. 448.

12. *Harmon v. Page*, 62 Cal. 448.

13. See *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139, and *Clarkson v. Moir*, 36 Cal. App. Dec. 1, 201 Pac. 474, both cases involving the construction of a Canadian act.

14. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799.

15. See *infra*, § 391.

levy of an assessment,¹⁶ or under a special statute fixing a liability for the par value of shares,¹⁷ is not applicable to suits in equity brought to enforce the implied obligation of a stockholder to pay the par value of the stock purchased by him. In one sense, it has been said, an action against the holder of watered stock is an action based upon fraud of the incorporators in accepting property at an overvaluation; but section 338 of the Code of Civil Procedure, subdivision 4, is not applicable to an equity suit by a creditor where the right does not arise before the assets of the corporation are exhausted. Such an action being in the nature of a creditors' bill, the time for commencing it is regulated by section 343 of the Code of Civil Procedure, which provides a limitation of four years after the cause of action has accrued.¹⁸ If the liability of the stockholder is upon his contract to pay the subscription as called for, even though called for by order of court, it is founded upon a contract within the statute of limitations.¹⁹ And where the action is founded upon a call by the board of directors upon the subscription liability, it is barred two years after the call is made,²⁰ not two years from the adjudication of insolvency.¹

16. *King v. Armstrong*, 9 Cal. App. 368, 99 Pac. 527.

17. *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139 (under Canadian act); *Clarkson v. Moir*, 36 Cal. App. Dec. 1, 201 Pac. 474 (under Canadian act).

18. *Sherman v. S. K. D. Oil Co.*, 61 Cal. Dec. 515, 197 Pac. 799, per Wilbur, J., holding that where statute runs from the maturity of notes, the action is barred as to stockholders brought in by amended complaint after four years.

19. *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420.

20. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047; *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420 (where call was by order of court and statute held to run in two years).

1. *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441.

XIII. ASSESSMENTS ON STOCK.

General Considerations.

§ 333. **In General.**—There are two classes of assessments made by corporations or by the directors thereof. The first of these is more properly distinguished as “calls” upon subscriptions within the amount of the sums unpaid upon the shares subscribed. The other is an assessment made upon the corporators, not merely as a part of their subscriptions, but to raise a sum of money beyond the amount of subscription for the use of the corporation in order to sustain its existence.² The procedure for levying and collecting an assessment and for the sale of delinquent stock is the same whether it be a “call” for subscriptions or an “assessment” on paid-up stock to care for debts and expenses.³ The word “assessment,” however, is the only word used in the code provisions and includes both calls on subscriptions and assessments on paid-up stock.⁴ “Assessment” as used in the constitution with reference to the jurisdiction of courts does not include an assessment by a private corporation on stockholders, but refers only to assessments authorized in relation to revenue and taxation to raise funds for local or public improvements; consequently, an action to collect assessments of a private corporation under three hundred dollars is not within the jurisdiction of the superior court.⁵ Nor is an action by a corporation to recover an assessment of less than two thousand dollars within the jurisdiction of the supreme court on appeal, even though

2. Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802.

3. Imperial Land etc. Co. v. Oster, 34 Cal. App. 776, 168 Pac. 1159; Bottle Min. & M. Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994.

4. Santa Cruz R. Co. v. Spreckles,

65 Cal. 193, 3 Pac. 661, 802; Bottle Min. & M. Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994.

5. Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54.

the assessment be on fully paid stock and not merely a call on unpaid shares.*

§ 334. Nature of Liability.—The liability of a stockholder for an assessment is one arising from contract. Since all applicable laws in existence when an agreement is made enter into it and form a part of it, as though expressly referred to and incorporated in its terms,^{6a} when one acquires stock, all of the provisions of the Civil Code declaring for what purposes and how directors may levy assessments, and the methods they may pursue in collecting them, enter into and become a part of his contract with the corporation.⁷ And the personal liability for assessments is sufficiently contractual in nature to permit of attachment proceedings.⁸ Nevertheless, the action on an assessment is solely by virtue of the obligation created by the statute and a strict observance of the statutory provisions is essential to a recovery.⁹

§ 335. Who may Levy Assessment.—The code provides that the directors of any corporation formed or existing under the laws of California may levy and collect assessments.¹⁰ However, the levying of assessments is a matter of discretion. The word "may" as used in the statute does not mean "must." The statute is in the nature of a grant of power and authorizes the making of assessments

6. *Bottle Min. & M. Co. v. Kern*, 154 Cal. 96, 97 Pac. 25.

6a. See *CONTRACTS*, ante, p. 310.

7. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298; *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244; *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994. See *Richey v. East Redlands Water Co.*, 141 Cal. 221, 74 Pac. 754 (liability arises out of contract of subscription).

8. *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244. See *ATTACHMENT*, vol. 3, p. 416.

9. *American Well etc. Co. v. Blakemore*, 184 Cal. 343, 193 Pac. 773; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994; *National Paraffine Oil Co. v. Chappell*, 4 Cal. App. 505, 88 Pac. 506.

10. Civ. Code, § 331.

for certain purposes; but it is not compulsory that the corporation exercise this power. The directors may conclude that it will be best to permit the corporate property to be sold to satisfy its debts rather than to levy assessments and sell the stock. The intent of the legislature in enacting the statute was merely to confer upon the corporation the power to do the things therein enumerated.¹¹ Directors, in order to levy an assessment, need not be a de jure board; a de facto board has the power to levy an assessment.¹²

§ 336. Levy by Insolvent Corporation.—Directors may, without order of court, call in unpaid capital, even after the insolvency of the corporation, for the purpose of liquidating its affairs.¹³ Indeed, it has been said to be their duty to do this, and if they do not act, the power of a court of equity may be invoked to order the call.¹⁴ The court in such case performs the functions of the corporate officers and becomes itself the trustee of the stockholders as well as of the creditors. The court determines

11. *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303 (as to nonassessable stock, but not as to discretion of directors, this case was overruled "on the facts" by *Martin v. Palmer Union Oil Co.*, 184 Cal. 386, 193 Pac. 950). See *Spurgeon v. Santa Ana etc. Irr. Co.*, 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140, opinion of Temple, J., concurring, where it is said that the law provides the mode in which the assessment may be enforced by sale and expressly declares the effect of the sale, and that creditors have an interest in this power and may sometimes compel the corporation to exercise it; hence it cannot be waived or destroyed by anything

in the by-laws or by any contract between the stockholders.

12. *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *San Joaquin etc. Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

13. *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *Union Sav. Bank v. Dunlap*, 135 Cal. 628, 67 Pac. 1084; *Union Sav. Bank v. Rinaldo*, 6 Cal. App. 637, 92 Pac. 873; *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

14. *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

the amount and assess against all the stockholders.¹⁵ The procedure to enforce assessments where the corporation is insolvent and has ceased to do business as a going concern is by action to collect, and not by selling the stock, since there is in fact no stock to sell.¹⁶ The provisions for a sale would, of course, be wholly useless in the case of a bankrupt corporation or one having no property subject to execution.¹⁷ Where, however, upon adjudication of insolvency, the order of court restrains the directors from transacting any further business except for liquidation, this has the effect of setting aside an assessment already made.¹⁸

§ 337. Necessity for Strict Compliance.—Proceedings by which the property of a stockholder is declared forfeited, without suit, or personal notice of any kind, are strictly construed. All conditions precedent to such forfeiture must exist and courts have no power to dispense with any one of them.¹⁹ It is a settled rule that proceedings in regard to the levy of an assessment and sale of the stock of a shareholder for a delinquent assessment are in invitum;²⁰ and since such proceedings are of that nature, it is elementary that they must be strictly followed. The levy of an assessment, therefore, can be accomplished legally only by a strict compliance with statutory provisions, or with the provisions of the charter of

15. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

16. *Union Sav. Bank v. Dunlap*, 135 Cal. 628, 67 Pac. 1084; *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383; *Union Sav. Bank v. Rinaldo*, 6 Cal. App. 637, 92 Pac. 873.

17. *Kaye v. Metz*, 61 Cal. Dec. 728, 198 Pac. 1047.

18. *Bank of National City v.*

Johnston, 133 Cal. 185, 65 Pac. 383. See comment on this case in *Union Sav. Bank v. Dunlap*, 135 Cal. 628, 67 Pac. 1084.

19. *Ruck v. Caledonia Silver Min. Co.*, 6 Cal. App. 356, 92 Pac. 194.

20. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Sayer v. McNulty*, 1 Cal. Unrep. 130; *Pettit v. Forsyth*, 15 Cal. App. 149, 113 Pac. 892; *Ruck v. Caledonia Silver Min. Co.*, 6 Cal. App. 356, 92 Pac. 194.

the corporation.¹ The reason for a strict construction in such cases is that a sale, if regular and founded upon a valid assessment, forfeits the stock, and equity has no power to relieve from such forfeiture.²

§ 338. Levy upon Subscribed Stock.—By section 331 of the Civil Code, directors are authorized, after one-fourth of the capital stock of a corporation has been subscribed, to levy and collect assessments upon the stock subscribed. The shares subscribed for become the basis for the assessment.³ Where a corporation has taken its own stock and holds it for any reason, the result is the same as though it had never been issued and still remained in the treasury.⁴ Consequently, it is provided that stock which the corporation has purchased upon a sale for delinquent assessments remains the property of the corporation and is not assessable, and assessments must be apportioned upon the stock held by the members.⁵

§ 339. Levy on Fully Paid Stock.—It is a general rule that when the amount called for in his contract with the company has been paid, a stockholder cannot be required to contribute an additional amount, unless power to levy an assessment is expressly conferred by the charter of the corporation or by statute in force at the time the stock was issued. But where there is such a statute, it becomes

1. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Newhall v. Hunsaker*, 38 Cal. App. 399, 176 Pac. 380; *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994; *Ruck v. Caledonia Silver Min. Co.*, 6 Cal. App. 356, 92 Pac. 194.

2. *Ruck v. Caledonia Silver Min. Co.*, 6 Cal. App. 356, 92 Pac. 194. See FORFEITURES.

3. *San Joaquin Land etc. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

See the inaccurate statement in *Kohler v. Agassiz*, 99 Cal. 9, 15, 33 Pac. 741, that assessments must be levied upon all the capital stock. This is the case which declares the assessment must not exceed ten per cent of the par value, rather than ten per cent of the capital stock named in the articles of incorporation.

4. See § 359.

5. Civ. Code, § 343.

a part of the stockholder's contract as much as if its provisions were set out therein.⁶ Under the code an assessment may be levied where stock has been fully paid up, as well as calls where it has not been paid up. The first subdivision of section 332 of the Civil Code in terms declares that if the whole capital has not been paid up, and the corporation is unable to meet its liabilities, the assessment may be for the full amount unpaid upon the stock. When such an assessment is collected the stock upon which it is levied becomes fully paid for; yet, according to section 333 another assessment may be levied. And the reason for the rule seems plain, for one of the purposes for which directors are authorized to levy an assessment is to conduct the corporate business. When the full amount unpaid upon the subscribed capital is required to meet liabilities, if the business is to be further conducted, it would, it has been said, seem reasonable to authorize another assessment for that purpose. "But whether reasonable or unreasonable, the law is so written."⁷ So it is the well-established rule in California that assessments may be levied upon fully paid-up stock.⁸

6. *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994. See *supra*, § 334. See *CONTRACTS*, ante, p. 310.

7. *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802.

8. *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303; *Campbell v. Santa Maria Oil etc. Co.*, 153 Cal. 282, 95 Pac. 39 (sustaining levy on stock issued as fully paid up); *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100; *Sayre v. Citizens' Gas Light etc. Co.*, 69 Cal. 207, 7 Pac. 437, 10 Pac. 408 (fully paid stock held assessable, under act upon which code sections were based); *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661,

802; *Sullivan v. Trianfo etc. Min. Co.*, 39 Cal. 459 (said by *Von Horst v. American Hop etc. Co.*, 177 Fed. 976, to have necessarily involved the question, so that while it was not discussed the conclusion arrived at must be regarded as sustaining the same view); *Browne v. San Gabriel etc. Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544 (where it is said that the code expressly provides that an assessment may be levied upon paid-up stock, the only difference being in the per centum of the levy; where the stock is fully paid the assessment must be for not more than ten per cent of the capital stock; where not fully paid, it may be for the whole difference between the

§ 340. Nonassessable Stock.—A contract between the corporation and a stockholder that certain shares should be nonassessable would, it has been held, create a preference or distinction and would come within the provisions of the statute requiring preferences to be expressed in the articles of incorporation. Consequently, shares of stock cannot be exempted from assessment unless provision is made in the articles of incorporation for a preferred class of nonassessable stock.⁹ Where stock is not nonassess-

sum actually paid and the par value of the stock); *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994; *Von Horst v. American Hop & Barley Co.*, 177 Fed. 976.

On the faith of such rule, millions have been invested in corporations and the question will not, therefore, be reopened; *Van Horst v. American Hop etc. Co.*, 177 Fed. 976.

9. *Martin v. Palmer Union Oil Co.*, 184 Cal. 386, 193 Pac. 950. (This case refers to the case of *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303, which held that the directors might agree with the stockholders that the stock should be nonassessable. The court says, however, that it is not certain from the opinion in the former case if such contract is valid when provision permitting it is not found in the articles. The opinion in the former case made no mention of Civ. Code, § 290, subd. 6. Consequently, the court overrules *Lum v. American Wheel Company*, not as necessarily incorrect in the principles declared, but as inadvertently applying those principles to a case where they were not applicable because of a positive statutory provision to the contrary.)

See dissenting opinion of Beatty, C. J., in *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303: "But two ways in which, under the laws of this state, the shares of corporate stock can be made unassessable have been suggested—one by a special agreement with the purchaser, the other by special provision in the charter." See note on case of *Lum v. American Wheel etc. Co.*, in 1 Cal. Law Rev. 540. See, also, *supra*, § 335.

The case of *Martin v. Palmer Union Oil Co.*, 184 Cal. 386, 193 Pac. 950, above cited, leaves undecided the question as to whether the board of directors may agree with all the stockholders that the corporate stock shall not be assessable, where no preference is made as to any portion of the stock. *Lum v. American Wheel Company*, laid down the general principle that the directors might agree not to levy assessments, and there is a dictum in *Browne v. San Gabriel etc. Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544, to the effect that the corporation may effectually waive its discretionary right to levy assessments, without deciding how.

able, the fact that, without authority, the secretary causes to be printed on the certificates a statement that it is non-assessable does not operate to make it such.¹⁰ And it has been held that a representation by a corporation to a prospective purchaser that stock is nonassessable is not merely an expression of opinion as to the law regulating assessment, but is a representation of fact.¹¹

Limitations or Conditions of Levy.

§ 341. Limitations on Power to Levy, in General.—

There are two limitations on the power conferred by section 331 of the Civil Code, the first being that no one assessment must exceed ten per cent of the amount of the capital stock named in the articles of incorporation, and the second, that no assessment must be levied while any portion of a previous one remains unpaid. But to each of these limitations, certain exceptions are made. One of the exceptions to the first limitation is, that if the whole capital has not been paid up and the corporation is unable to meet its liabilities, one assessment may be for the full amount unpaid upon the capital stock, even though it exceed ten per cent of the amount of the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount. And one of the exceptions to the second limitation, which prohibits the levy of any assessment while any portion of a previous one remains unpaid, is when the previous assessment falls within the provisions of either the first, second or third subdivision of section 332. In other words, when the previous subdivision falls within such provisions, another assessment may be levied while the previous one

10. *Campbell v. Santa Maria Oil etc. Co.*, 153 Cal. 282, 95 Pac. 39.

11. *Merchants Realty etc. Co. v. Kelso*, 31 Cal. App. Dec. 517, 189 Pac. 116. (If such representation is untrue, it would be actionable and entitle the purchaser to rescind

his contract); *Browne v. San Gabriel etc. R. Co.*, 22 Cal. App. 682, 136 Pac. 542, 544 (on ground that the corporation has power effectually to waive its discretionary right to levy assessments).

remains unpaid.¹² Thus, where an assessment has been levied to call in amounts unpaid on stock, and the assessment remains unpaid, the amount theretofore unpaid upon the capital stock still remains unpaid, and the power of the directors to levy assessments under subdivision 1 of section 332 of the Civil Code is not exhausted; the board of directors have power, therefore, to levy another assessment, and the statute of limitations as to the new assessment does not commence to run prior to its levy.¹³ Other exceptions to the second limitation occur where the collection of a previous assessment has been enjoined, or where the power of the corporation has been exercised in accordance with the provisions of the law for the purpose of collecting the previous assessment.¹⁴ An assessment levied while a previous one remains unpaid may be valid if the power of the corporation has been exercised for its collection, but the offsetting of salaries fraudulently granted by directors will not constitute payment of the previous assessment.¹⁵

§ 342. Subscription of One-fourth of Stock.—A rule generally prevailing is to the effect that, in the absence of a statutory provision to the contrary, a corporation cannot levy an assessment upon stock until the whole amount of the capital has been subscribed.¹⁶ This rule has been modified in California, however, by the code provision that an assessment may be levied after one-fourth of the capital stock has been subscribed.¹⁷ If one-fourth of the capital has not been subscribed, therefore, the corporation has no power to levy an assessment,¹⁸ and such an assess-

12. *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; Civ. Code, §§ 332, 333.

13. *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441.

14. Civ. Code, § 333,

15. *Strouse v. Sylvester*, 6 Cal. Unrep. 798, 66 Pac. 660.

16. *McCarty v. More*, 181 Cal. 738, 186 Pac. 140; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487.

17. Civ. Code, § 331.

18. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Walter v. Merced Acad.*

ment is void. This is a condition precedent to the exercise of the power, and in order that a complaint may show a right of recovery, it is necessary to allege the existence of the condition under which the power may be exercised.¹⁹ The provision of the code is completely satisfied, however, by the issuance and full payment for certificates for more than one-fourth of the stock.²⁰ A complaint in an action to recover an assessment which alleges that a certain number of shares, amounting to less than one-fourth, have been subscribed fails to show a right of action;¹ but a complaint failing to show that one-fourth of the stock has been subscribed is cured by an answer averring that one-third of the stock had been originally issued to plaintiff and a third person.²

§ 343. Amount of Assessment.—Under ordinary circumstances, the amount of an assessment which may be levied may not exceed ten per cent of the capital stock named in the articles of incorporation.³ From this rule the only departure authorized by the code is that in cases where the stock is not fully paid up, an assessment may be levied for the whole difference between the sum actually paid in on the stock and the par value.⁴ Hence, in an action to recover the amount of an assessment levied by the corporation in excess of ten per cent of the capital stock, the burden of proving that the assessment is valid is upon the corporation; and where no evidence is introduced tending to show that the subscribed capital stock

emy Assn., 126 Cal. 582, 59 Pac. 136; *Ventura etc. R. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65.

19. *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487. See *McCarty v. More*, 181 Cal. 738, 186 Pac. 140 (contention raised, but not decided).

20. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17; *Bottle*

Min. & M. Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994.

1. *Ventura etc. R. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65.

2. *Pettit v. Forsyth*, 15 Cal. App. 149, 113 Pac. 892.

3. Civ. Code, § 332.

4. *Browne v. San Gabriel etc. Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544.

has not been fully paid up, the assessment is void.⁵ But the maximum amount of any one assessment, as will be seen from section 332 of the Civil Code, is ten per cent of the amount of the capital stock "named in the articles of incorporation,"⁶ while from section 331 of the same code it appears that the assessment is authorized to be levied only upon the "subscribed capital stock" of the corporation.⁷ It is apparent, therefore, from these provisions of the code that an assessment may properly be in excess of ten per cent of the par value of the shares, where all of the capital stock named in its articles of incorporation had not been subscribed.⁸

§ 344. Uniformity of Assessments.—Assessments on stock must, as a rule, be equal and uniform.⁹ An assessment upon certain of the shareholders and not upon others is invalid.¹⁰ But under section 332 of the Civil Code, it is proper, where part of the stock has been fully paid, or partially paid, to levy an assessment for the unpaid portion of the subscription price upon those shares upon which a less amount or nothing has been paid, in order to equalize the subscription payment on all the stock.¹¹ It has been said that it would not be proper to levy an assessment to call in a given amount on one portion of the un-

5. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542.

6. *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802.

7. *San Joaquin Land etc. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

8. But see *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741, where the court in passing said: "Under the laws of California a stockholder may be lawfully called upon and required to pay assessments upon his stock to the extent of ten per cent of the par value thereof, except where the whole capital is not paid up."

9. *O'Dea v. Hollywood Cemetery*

Assn., 154 Cal. 53, 97 Pac. 1; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741 (where it is said assessments must be uniform and must be levied on all the capital stock); *Imperial Land etc. Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

10. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

11. *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Imperial Land etc. Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

paid stock and a less amount on another, if all the stock stood in the same class as to unpaid subscriptions. A call cannot be made which will affect only a portion of those who stand in the same class as to the amount of unpaid subscriptions, but if, upon a portion of the stock, all or half has been paid, and nothing or but a small amount had been paid on another portion, an assessment may be properly levied on the stock which has made the smaller payments in order to equalize the contributions. This is the only mode of assessment as to different classes of stock which would not be violative of the rule that all assessments must be uniform.¹² To require the payment of a greater sum of the original subscribers than of subsequent ones would, it has been said, be discriminatory and invalid as against public policy.¹³

§ 345. Purposes of Assessment in General.—There exists an implied contract upon the part of stockholders to pay to the corporation money whenever, for the proper purposes of the corporation, the directors by legal assessments call for it.¹⁴ The code provides that assessments may be for the full amount of the unpaid subscription where the corporation is unable to meet its liabilities or to satisfy the claims of its creditors; or if a less amount is sufficient for that purpose, the assessment may be for such a percentage as will raise that amount.¹⁵ In ordinary cases the directors may levy assessments for the purpose of paying expenses, conducting business or paying debts.¹⁶ Recovery of an assessment cannot be resisted on the ground that the stockholder sued was not such at the time the obligation was contracted or the liability incurred for

12. *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143 (where collected against certain shares only); *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

13. *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123.

14. *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

15. Civ. Code, § 332, See *supra*, § 343.

16. Civ. Code, § 331.

the payment of which the assessment is levied,¹⁷ for the same principles do not apply as in the case of the stockholder's constitutional liability.¹⁸ In the absence of allegations showing actual fraud in levying an assessment, fraud will not be presumed; thus, allegations that an assessment has been levied merely for the purpose of "freezing out" certain stockholders does not make such fraud appear, and if the act itself is not illegal, the motive prompting it is not material.¹⁹ Fraud in levying an assessment must be pointed out by specific facts which in and of themselves tend to impart that complexion to the transaction or are susceptible of that construction. Mere general allegations of fraud, however, are not sufficient.²⁰

17. *Visalia etc. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

18. *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994, (saying that if the decisions, statutes and provisions of the constitution relating to the personal liability of a stockholder to the creditors and the principles upon which they are based, could be considered, and the matter were an open question, there might be some doubt as to the right of directors to collect by personal action any assessment levied to pay a debt of the corporation which was not alleged to have been created during the time the person sued was a holder of stock).

19. *Glenn v. California Trona Co.*, 38 Cal. App. 601, 177 Pac. 178; *Von Horst v. American Hop etc. Co.*, 177 Fed. 976 (averments that defendants, through malice and enmity and other improper motives, entered into a conspiracy to deprive plaintiff of his holdings in

the corporation through fraudulent and inequitable means, by making repeated assessments upon the stock without right and necessity, in the expectation of selling out his stock without notice to him and without opportunity to protect himself, held mere general allegations and not sufficient). See *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 24, 17 Pac. 940 (levy of such assessment is not sufficient ground for action by stockholder to compel dissolution). See *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458 (levying assessment to pay debt which corporation did not owe and selling stock for such assessment, where it did not appear that money was so used). See, also, *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729, where the record in an action to annul a sale under a fraudulent assessment was set up as a defense.

20. *Von Horst v. American Hop etc. Co.*, 177 Fed. 976. See FRAUD AND DECEIT.

§ 346. **Particular Purposes of Assessments.**—It has been said to be extremely doubtful whether an assessment levied for the purpose of replacing assets wrongfully diverted and distributed among stockholders may be upheld under the code provisions prescribing that assessments may be levied for the purpose of paying expenses, conducting business, or paying debts.¹ But a corporation which is liable to a stockholder for money borrowed for the payment of expenses collateral and incidental only to an act which may have been ultra vires, the expenses not being inseparably connected with the main act, and the corporation being liable, may levy an assessment for the purpose of paying the money due.² And the court has said that it cannot hold that levying an assessment to pay a debt which the corporation did not owe, and selling stock for such purpose, especially when it does not appear that the money realized was so used, constitutes a fraud.³ The fact that the debt is to a director, the corporation being unable to obtain money from other sources, does not bar the levying of an assessment to pay it.⁴ It is competent and proper for a corporation to take any regular course to relieve itself of its obligations; assessment is one mode that it may adopt unless there is something in the contractual situation of the parties to prevent that course or make it inequitable.⁵ And the fact that an assessment is levied to pay debts as a prerequisite to disincorporation, in order that the individual incorporators may go to another state to reincorporate where the blue sky laws are less strict, has been held not to invalidate it.⁶

A corporation clearly has power to levy assessments for proper and legal expenses of the corporation, including its

1. *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586.

2. *Taylor v. North Star etc. Mining Co.*, 79 Cal. 285, 21 Pac. 753.

3. *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458.

4. *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802.

5. *Von Horst v. American Hop etc. Co.*, 177 Fed. 976.

6. *Dammann v. Hydraulic Clutch Co.*, 31 Cal. App. Dec. 212, 187 Pac. 1069.

debts accrued, as well as costs and charges of contemplated operations of the company,⁷ even though the indebtedness of the company exceeds the limit permitted by law.⁸ An assessment to repair machinery without which the corporation cannot meet the demands made on it by the public is clearly authorized.⁹ An insolvent corporation may, of course, by assessment of the amount unpaid on its capital stock, raise an amount sufficient to satisfy the claims of creditors.¹⁰

Who are Liable.

§ 347. Subscribers to Articles.—Persons who subscribe to the articles of incorporation are to be treated as stockholders in the amounts set out in such articles.¹¹ It is not necessary to the validity of the corporation or to the subscribers becoming stockholders that they should all sign the articles. Those who sign act as agents of the other subscribers.¹² But subscribers, to be held as stockholders, must be named in the articles, for the articles must be held to limit the power of the corporation, so that it can bind as stockholders as of the date of the filing of the articles only those named in the articles, and only to the extent of the amounts therein mentioned.¹³

§ 348. Record Holders of Stock.—For the purpose of ascertaining those who are liable for an assessment, the corporation can look only to the names registered upon its books as stockholders. Where one appears as such, he may not divest himself of liability by the assignment of

7. *Sullivan v. Triunfo etc. Min. Co.*, 39 Cal. 459. See *Bay View Homestead Assn. v. Williams*, 50 Cal. 353 (where an assessment was levied for payment of debt).

8. *Sullivan v. Triunfo etc. Min. Co.*, 29 Cal. 585.

9. *Younglove v. Steinman*, 80 Cal. 375, 22 Pac. 189.

10. See *supra*, § 336.

11. *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136.

12. *San Joaquin Land etc. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

13. *Monterey etc. R. Co. v. Hildreth*, 53 Cal. 123.

his certificate to another person subsequent to the levy of the assessment, especially where no transfer on the books is procured by the assignee.¹⁴ Subscribers who are accepted by the corporation as stockholders become thereby and are thenceforth bound as such, and are liable to assessment,¹⁵ and to constitute subscribers stockholders for the purpose of assessment it is not necessary that certificates should be issued to them.¹⁶ Where an assessment is made on the same day on which the certificate of stock is issued, the stockholder will be held liable, as it will not be presumed that the assessment was made a fraction of a day before the purchase of the stock.¹⁷

One becomes liable for assessments who holds stock of record even though he is in fact but a pledgee.¹⁸ But one cannot be made liable to creditors merely because, without his knowledge and under circumstances which did not put him on inquiry someone had, without authority, caused stock to be issued in his name.¹⁹ The owner of the shares must pay assessments on them, even though the certificates are not in his possession. Thus, the leaving of un-

14. *Visalia etc. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10. See *Hurlbert v. Title Ins. & Tr. Co.*, 181 Cal. 692, 186 Pac. 142 (holding, where stock was held in joint tenancy, the stock appearing on the books in the name of one joint tenant, whose death left the other joint tenant the sole owner that survivor had no action against executor of deceased for failure to pay assessments).

15. *San Joaquin Land etc. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

16. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *San Joaquin Land etc. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Mitchell v. Beckman*, 64 Cal. 117,

28 Pac. 110; Civ. Code, § 323. See Civ. Code, § 338, which provides that where certificates have not been issued to parties entitled thereto, the notice must specify the number of shares and amount due thereon, together with the fact that the certificates have not been issued.

17. *San Gabriel Valley etc. Co. v. Dennis*, 4 Cal. Unrep. 272, 34 Pac. 441.

18. *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

19. *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227 (where record holder knew or ought to have known that stock had been issued to him).

assigned certificates in the hands of the clerk of the court to await a final decree in a suit for the rescission of the sale does not throw on the defendant the burden of paying assessments upon or otherwise taking care of the stock.²⁰ And a purchaser of stock is entitled to pay assessments in order to preserve the property, and such payment is not an affirmance of a fraudulent transaction.¹ So where certificates are stolen, the owner of the shares should nevertheless pay assessments, and neither the corporation nor a purchaser from the thief can be held responsible for omission to do so and for the sale of the stock for failure to pay assessments.² One who holds stock in pledge and pays assessments thereon without request of the owner for such payment cannot recover back the money paid.³

§ 349. Transferees.—One purchasing stock from an original subscriber and causing the transfer to be entered upon the corporate books becomes substituted for him, and thereafter holds the shares subject to the same obligations as did the transferor. This is so because every liability which attaches to a stockholder as such is inseparable from the ownership of the stock, and the reasons for subjecting original subscribers to personal liability apply with equal force to those who become stockholders by purchase.⁴ Delinquent assessments constitute a lien on the shares, although not on the certificates, which are but non-negotiable evidence of the ownership of the shares. The identity of the shares is not affected by the transfer, and they remain subject to the lien of the assessment. The stock book enables a purchaser to trace his shares back to the original issue and thus identify the shares

20. *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797.

1. *Munson v. Fishburn*, 183 Cal. 206, 190 Pac. 808.

2. *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

3. *Wetmore v. Barrett*, 103 Cal. 246, 37 Pac. 140 (where pledge was void on account of transaction being purchase of stock in margin).

4. *Visalia etc. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

upon which any assessment has been made, and in the same manner enables the corporation to enforce a delinquent assessment on shares liable therefor, no matter how many transfers have been, for each transferee takes the legal title subject to an assessment.⁵ Although the personal liability of the former owner is not transferred, the stock itself remains subject to be charged for calls and the enforcement of such charge by sale in the manner prescribed by law, and when the transferee has the transfer recorded on the books, he becomes personally liable for subsequent calls.⁶ Having accepted a certificate of stock, it will be presumed that stock so received is held by a transferee subject to the conditions and liabilities that would have been imposed on an original subscriber.⁷ But the right to proceed to sell stock in case of delinquency does not depend on the actual owner being a stockholder of record, although if he is not such he cannot be held personally liable.⁸

§ 350. Trustees.—Section 331a of the Civil Code provides:

“Whenever shares of the capital stock of any corporation stands [*sic*] in the name of a trustee with the names of the beneficiaries of the trust disclosed thereon, or whenever the corporation has notice that any of its shares of stock is [*sic*] held in trust, and has a list of the names of the beneficiaries of such trust, even though the certificate representing said shares is issued in the name of the trustee individually, and without any notice thereon of such trust, the person holding such stock as trustee shall not be

5. *Craig v. Hesperia Land etc. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10 (not deciding whether transferee on books would take stock discharged of any lien undisclosed by the corporation at time of transfer and issuance of new certificate); *Craig v. Hesperia Land etc. Co.*, 107 Cal. 675, 40 Pac. 1057.

6. *Geary St. etc. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457.

7. *Stockton etc. Agr. Works v. Houser*, 109 Cal. 1, 41 Pac. 809.

8. *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280.

personally liable for assessments made or levied by the corporation upon such stock, but such personal liability, for stock assessments shall only be upon and against the beneficial owners of such stock or the beneficiaries of the trust of which such stock may constitute a part."⁹

This provision changed the prior rule that trustees who were the record holders of stock were liable personally to the corporation on account of assessments even where they disclosed to the corporation the names of the persons for whom they acted as trustees.¹⁰

Levy and Enforcement of Assessment.

§ 351. Order Levying Assessment.—The levy of an assessment must be by resolution of the board of directors adopted at a regular meeting or at a special meeting regularly called; otherwise it is void.¹¹ And if the assessment was levied by directors whose election was illegal, the act of levying the assessment is likewise void.¹² It must appear that the levy was by a quorum of the board,¹³ and, as against creditors at least, a by-law cannot alter the mode of levying by requiring a two-thirds vote of the stock out-

9. Added by Stats. 1919, c. 237.

10. Webster v. Bartlett Estate Co., 35 Cal. App. 283, 169 Pac. 702; La Habra Oil Co. v. Francis, 35 Cal. App. 168, 169 Pac. 401 (holding that Union Sav. Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098, could not be distinguished on the ground that assessment in that case was on stock not fully paid, for as between the corporation and its legal stockholders, that fact is immaterial; and also that the provisions of Civil Code, § 322 only relieve a trustee where creditors seek to enforce the statutory liability); Union Sav. Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098 (holding that Civil Code, § 332, had no

application to the recovery of assessments).

11. Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; Bell v. Standard Quick-silver Co., 146 Cal. 699, 81 Pac. 17; Younglove v. Steinman, 80 Cal. 375, 22 Pac. 189; Thompson v. Williams, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; Harding v. Vandewater, 40 Cal. 77; Beatty v. Rianda, 34 Cal. App. 180, 167 Pac. 185; Raisch v. M. K. & T. Oil Co., 7 Cal. App. 667, 95 Pac. 662.

12. Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

13. Humphrey v. Buena Vista Water Co., 2 Cal. App. 540, 84 Pac. 296.

standing.¹⁴ Section 334 of the Civil Code provides for the contents of the order:

“Every order levying an assessment must specify the amount thereof, when, to whom, and where payable; fix a day, subsequent to the full term of publication of the assessment notice, on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.”

Consequently, where no place is specified where the assessment is payable, it is void, and the court will not speculate as to whether or not the stockholder could have been injured by the omission. The order must comply with the statute in its essentials and contain the substance of every requirement therein, although this does not mean that an order which does not literally follow the statutory language would be declared void.¹⁵

§ 352. Form of Notice of Assessment.—The Civil Code provides for the form of notice of assessment.¹⁶ The notice required to be given stockholders of assessments must be as the statute prescribes. The legislature has the authority to designate the form of notice to be given, and having done so, and the secretary having given the notice thus provided, it is sufficient, and the fact that a notice describes the assessment as being “levied upon the capital stock of the corporation,” as in section 335 provided, instead of

14. *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441.

15. *Buck v. Caledonia Silver Min. Co.*, 6 Cal. App. 356, 92 Pac. 194, where the court said in part: “To require the order levying the assessment to comply with the statute in its essentials is to leave

the rule plain so that everyone may understand it.”

16. Civ. Code, § 335; and as to form of notice, see *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; *Stephens v. Lemoore Canal etc. Co.*, 22 Cal. App. 579, 135 Pac. 707.

upon the subscribed capital stock, is not material.¹⁷ A notice is in compliance with the code directions even where the place of sale of delinquent stock is not specifically mentioned.¹⁸

§ 353. Publication and Service of Notice of Assessment. The statute provides that the notice of assessment shall be served upon each stockholder either personally or by mail, and shall be published at the principal place of business of the corporation and also in the county in which the works of the corporation are situated, provided the works are within a state or territory of the United States.¹⁹ Admittedly, then, the giving of notice by publication alone under the code section does not suffice, but in addition to publication, either personal service or service by mail is required.²⁰ Failure to publish notice in the county where all the works of the corporation are located renders a sale defective.¹ Notice to the record holder of stock is sufficient notice to one holding a joint interest with him.² But where the mailing of the notice is alleged to have been done forthwith, this must be construed to refer to the time of the passage of the resolution. Since the statute provides no particular time prior to either the date of delinquency or the date of sale when the notice of assessment must be published, the allegation that it was published at the places and for the duration of time required by stat-

17. *San Joaquin etc. Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

18. *Stephens v. Lemoore Canal etc. Co.*, 22 Cal. App. 579, 135 Pac. 707. It will be observed that no provision for stating the place of sale is to be found in § 335 of the Civil Code. A provision for stating the particular place is provided for as to notices of delinquency in Civil Code, § 337.

19. Civ. Code, § 336.

20. *Whitecomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887; *Stephens*

v. Lemoore Canal etc. Co., 22 Cal. App. 579, 135 Pac. 707.

1. *American Well etc. Co. v. Blakemore*, 184 Cal. 343, 193 Pac. 773.

2. *Whitecomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887, (where the stock was never transferred on the books, but the holder's name was merely written in after the former owner's name on the original certificate, the new owner stating that he was interested jointly in the stock).

ute is sufficient. The ordinary requirement that notice be given so many days before a date or time mentioned is lacking, but this apparent defect cannot, it has been said, be remedied by the courts. That notice was given as provided by statute is all that is necessary to support the right to sell the stock.³ Whether a failure to publish notice of the assessment and delinquency in every county where some part of the corporation's works may happen to be vitiates the sale of stock is not expressly answered by the code provisions.⁴

§ 354. Delinquency and Delinquent Notice.—Where any portion of an assessment remains unpaid on the day specified for declaring stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause a notice of delinquency to be published in the same papers in which the assessment notice was published.⁵ The meaning of the code section is not that the secretary must publish, unless directed not to publish, and that if he publish notice of a delinquent sale at all, it must be in the paper in which the notice of assessment was published; but, on the contrary, the meaning is that the notice must be published in the same paper unless the directors order it published in a different one.⁶ And this notice must be published for ten days in a daily paper or for two weeks

3. *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

4. *Stephens v. Lemoore Canal etc. Co.*, 22 Cal. App. 579, 135 Pac. 707, where a small portion of works of corporation was in one county and principal place of business and the larger portion of the works were in another county, and publication was made only in latter county. The court said that the question as to whether or not failure in all cases to publish notice of assessment and delinquency in every county where some part of the

corporation's works may happen to be could vitiate the sale, is not expressly answered by the code provisions, and it did not feel called upon to decide the question.

5. Civ. Code, § 337, which prescribes the form of notice. See, also, Civ. Code, § 338, providing that notice must specify certificates or shares on which assessment is delinquent. And see, in general, *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487.

6. *Stockton etc. Agr. Co. v. Houser*, 109 Cal. 1, 41 Pac. 809.

previous to the day of sale in a weekly paper, but the first publication must be at least fifteen days prior to the day of sale.⁷ The provision requiring the first publication to be fifteen days prior to the day of sale is not complied with by a publication for any less number of days,⁸ and by failure to make publication at least fifteen days prior to the day fixed for the sale, the corporation loses jurisdiction to sell the stock, unless all proceedings subsequent to levy are begun anew, as authorized by section 346 of the Civil Code.⁹ By due publication the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice,¹⁰ but no right to sell stock can accrue until the sale has been duly advertised and the date of sale has arrived.¹¹

§ 355. Postponement of Delinquent Stock Sale.—Section 345 of the Civil Code provides:

“The dates fixed in any notice of assessment or notice of delinquent sale, published according to the provisions hereof, may be extended from time to time for not more than thirty days, by order of the board of directors entered on the records of the corporation, or by the secretary or assistant secretary of the corporation when delinquent sale is restrained by order of court, or by judge thereof; but no order extending the time for the performance of any act specified in any notice is effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates.”

Under this section, the date fixed for the sale can be extended or postponed only thirty days, and orders of the board of directors extending the date beyond this are not only without authority, but are in direct contravention of

7. Civ. Code, § 339.

8. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 939, Civ. Code, § 346, prevents invalidation of the levy, but noncompliance renders void all proceedings subsequent to the levy.

9. *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487.

10. Civ. Code, § 340.

11. *Imperial Land etc. Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

the provisions of the section, which cannot be construed as authorizing an indefinite number of extensions provided each is for a period of less than thirty days, but is to be construed as limiting the right to extend the dates fixed in the order levying the assessment to thirty days in the aggregate.¹² This section and the section permitting the beginning anew of proceedings where invalid because of irregularity (set out in the next section) must be construed together, and they have been declared not to be inconsistent. One provides for the extension of time in the case of proceedings for collection by sale which it is proposed to complete; the other provides for the inauguration of entirely new proceedings for collection, in case the first attempt becomes invalid because of some substantial error or omission. And section 345 of the Civil Code is not inconsistent with section 334 of the same code, which provides that the date of sale fixed in the levy of an assessment must not be more than sixty days after the levy itself. Section 334 is necessarily modified by the provisions of section 345 as to postponement of the time fixed in the original order by republishing the original notice with the order of postponement appended.¹³ But there can be no proper postponement unless the notice of assessment provided in the statute is republished; the republication of the notice of sale is not sufficient.¹⁴ The order of postponement, to be a valid corporate act, must, of course, be made at a meeting of directors properly called and noticed.¹⁵

§ 356. Beginning Proceedings Anew After Irregularity.
The Civil Code provides by section 346:

“No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by

12. *National Paraffine Oil Co. v. Chappellet*, 4 Cal. App. 505, 88 Pac. 506. 14. *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10.

13. *Smith v. Gate City Oil Co.*, 160 Cal. 446, 117 Pac. 525. 15. *Whitecomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887.

the nonperformance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew."

This section means that where an irregularity occurs consisting of some substantial error or omission, the proceedings subsequent to levy only are void, and publication may be begun anew. It is intended to declare that the irregular proceeding is inoperative to confer an indefeasible title to the stock as against an owner who proceeds according to section 347 of the Civil Code.¹⁶ In the new proceeding, the notice of assessment must be published anew and it is not a sufficient compliance with section 346 to publish anew only the notice of sale,¹⁷ for where all steps are vacated except the levying of the assessment itself, the publication of all notices subsequent to the levy are required to comply with the code.¹⁸ This section also modifies section 334 and permits the fixing of the date of sale beyond the sixty days from the levy, and also modifies section 345 and permits a greater extension than thirty days, where proceedings are begun anew after substantial error or omission.¹⁹

§ 357. Enforcement of Assessment by Sale of Stock.—

The code expressly provides that corporations have power to sell the stock for the payment of assessments or installments.²⁰ Jurisdiction to make a sale is conferred by publication of the notice of the delinquent stock sale,¹ and the stock can be sold only at a sale after the giving of public notice required by statute, for there is no right to sell

16. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 939.

17. *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10.

18. *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

19. *Smith v. Gate City Oil Co.*, 160 Cal. 446, 117 Pac. 525.

20. Civ. Code, § 354, subd. 7.

1. Civ. Code, § 340.

until due advertisement and the day of sale has arrived.² If the publication is defective, there is no jurisdiction to sell unless proceedings have been begun anew under the provisions of the code.³

On the day, at the place and at the time appointed in the notice of sale, the secretary must, unless otherwise ordered by the directors, sell or cause to be sold at public auction to the highest bidder for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon.⁴ Even where the precise mode of sale is not pointed out by statute, it has been said that the stock cannot be sold at a private sale, since as to the owner the sale takes place in invitum.⁵ Sales being required to be to the highest bidder for cash,⁶ this rule must be strictly complied with to place the sale beyond attack. Thus, the acceptance of a note for the delinquent stock bid, despite payment of same before proceedings brought to recover the stock sold, constitutes a defect or at least an irregularity. The sale must be upon a cash basis, and the purchaser must be ready and able to pay in money the amount of his offer at the time his bid is accepted.⁷

§ 358. Bidding and Purchase of Stock at Delinquent Sale.

An arrangement to refrain from competitive bidding at a delinquent stock sale is collusive and inequitable, and equity will not permit the parties to such a transaction to retain

2. *Imperial Land etc. Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159. the highest bidder." Civ. Code. § 342.

3. *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487.

4. Civ. Code, § 341.

5. *Sayer v. McNulty*, 1 Cal. Unrep. 130.

6. Civ. Code, § 341. "The person offering . . . to pay the assessment and costs for the smallest number of shares or fraction of a share is

7. *Newhall v. Hunsaker*, 38 Cal. App. 399, 176 Pac. 380, stating that the rule is not the same as in case of subscriptions for stock where the statute permits stock to be issued for property as well as for cash, a note being considered property.

As to auction sales generally, see *AUCTIONS*, vol. 3, p. 755.

the fruits thereof.⁸ A corporation in offering stock for sale to pay a delinquent assessment acts as the agent of the delinquent stockholder. It can acquire title only in default of bidding by others and by bidding the stock in itself. When, therefore, stock is offered for sale, the purchaser takes, not the title of the corporation, but the title of the delinquent stockholder and no other, and takes it subject to the liability for unpaid subscription price.⁹ It has been held that, although the stock of a water company is transferable under its charter or by-laws only with the land to which it is appurtenant, these provisions have no application to a sale of delinquent stock for unpaid assessments.¹⁰ The purchaser at a delinquent sale is the transferee, not of the former owner of the stock, but of the corporation itself. He comes in on the footing of an original subscriber; at least he can claim from the corporation all the privileges of a subscriber so far as necessary to enable him to enjoy the fruits of his purchase.¹¹ But the agent of a stockholder who has received a sum of money with which to protect the stock cannot purchase the stock at delinquent sale and set up title in himself.^{11a}

8. *Seymour v. Salsberry*, 177 Cal. 755, 171 Pac. 938. See *Young v. New Standard etc. Co.*, 148 Cal. 306, 83 Pac. 28, where there was an agreement by a pledgee of stock sold at delinquent sale that, if permitted to purchase without competition in bidding, he would hold same as collateral security for his debt and company should not permit transfer except as a credit on the notes. The court held that such agreement constituted the corporation a trustee, for the purpose of seeing that the proceeds of the sale were properly applied and it might properly refuse transfer of

the stock on the books in violation of the agreement.

As to agreements not to bid at auctions generally, see *AUCTIONS*, vol. 3, p. 760.

9. *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1.

10. *Spurgeon v. Santa Ana etc. Irr. Co.*, 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140. See *Woodstone Marble etc. Co. v. Dunsmore etc. Water Co.*, 31 Cal. App. Dec. 1045, 190 Pac. 213 (execution sale).

11. *Spurgeon v. Santa Ana etc. Irr. Co.*, 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140.

11a. *Wilson v. Crabtree*, 12 Cal. App. 360, 107 Pac. 328.

§ 359. **Purchase by Corporation.**—In default of bidders at the sale, the statute authorizes the corporation itself to purchase delinquent stock.¹² The code sections dealing with the subject provide that, in such cases, the amount of the costs, assessments and charges must be credited on the books of the corporation as paid in full and the stock must be transferred to the corporation on its books. While the stock remains the property of the corporation, it is not assessable, nor must any dividends be declared thereon. It has been held that an agreement by a director to purchase stock at a delinquent sale, if no other bidder should offer the amount of the assessment, costs and charges, and to hold same in trust for the corporation, which was to repay his expenditures, is void as in violation of public policy. Any agreement by which the stock is reissued to the director is necessarily in violation of the statute. The very purpose of the statute is to prevent directors from continuing themselves in power by secret manipulation of the stock through trustees.¹³ But the fact that one is a director gives rise to no presumption that he is acting for the corporation in purchasing the stock.¹⁴

It is clearly the rule in California, as between the stockholder and the corporation, that the effect of a sale made to meet delinquency in the payment of assessments is wholly to divest the stockholder of all right or interest in the stock and to pass title to the corporation and therefore to terminate all liability on the part of the stockholder for unpaid balances on his stock.¹⁵ Stock purchased by the corporation at a delinquent stock sale is held subject to the control of the stockholders. Thus, it cannot be levied upon under an execution against the cor-

12. Civ. Code, §§ 343, 344.

etc. Co., 22 Cal. App. 579, 135 Pac. 707.

13. Lemoore etc. Irr. Co. v. McKenna, 163 Cal. 736, 127 Pac. 345.

15. American Well etc. Co. v. Blakemore, 184 Cal. 343, 193 Pac. 773.

14. Stephens v. Lemoore Canal

773.

poration. The corporation has no interest which it can dispose of, nor any interest which a creditor can dispose of at a forced sale.¹⁶ Such shares are dormant and can only be resuscitated by selling them and placing the selling price in the treasury. It would require corporate action to authorize the sale of these shares. The purchase has the effect of reducing the capital stock temporarily and until the shares shall be regularly reissued; so long as the stock remains in the treasury, it represents no part of or interest in the property of the corporation.¹⁷

§ 360. Enforcement by Action in General.

"On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof."^{17a}

On the day of delinquency, the stockholder owes the money called for to the corporation.¹⁸ There are two methods of enforcing the liability: one by sale of the stock in pursuance of the statute, the other by action at law at the option of the board of directors under section 349 of the Civil Code.¹⁹ But the directors cannot pass a resolution directing collection of the assessment by suit until after it has become delinquent.²⁰ Insolvent corporations can collect delinquent assessments only by action, as there is in fact no stock to sell.¹

16. Robinson v. Spaulding etc. Min. Co., 72 Cal. 32, 13 Pac. 65.

17. Tulare Irr. Dist. v. Kaweah, Canal etc. Co., 5 Cal. Unrep. 330, 44 Pac. 662.

17a. Civ. Code, § 349.

18. Imperial Land etc. Co. v. Oster, 34 Cal. App. 776, 168 Pac. 1159.

19. San Joaquin etc. Water Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Imperial Land etc. Co. v. Oster, 34 Cal. App. 776, 168 Pac. 1159.

20. Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383.

1. Union Sav. Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084; Bank

§ 361. Waiver and Election to Proceed by Suit.—The board of directors need only sufficiently indicate their intention to waive further proceedings for the collection of delinquent assessments by sale and to proceed by action under section 349 of the Civil Code.² It is not necessary to make any further demand before bringing suit than the notice of assessment and mailing thereof to stockholders.³

The words "to waive" contained in section 349 imply the abandonment of a right which can be enforced, or of a privilege which can be exercised, and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence. Thus, where by failure to make publication according to law all jurisdiction to sell the stock has been lost, unless proceedings are begun anew, there can be no election to proceed by action.⁴ There must be an election to sue, however. Thus, in the absence of allegations or findings necessary under the provisions of the code to create a personal liability of the stockholder, the liability cannot be set up as a counterclaim.⁵ The corporation need not elect to proceed by action in case of all stockholders, however, and an election is not illegal and void for lack of uniformity, because made as to one stockholder and not as to others against whom the assessment was levied.⁶

§ 362. Discharge and Limitation of Liability.—Actions to recover a penalty or forfeiture imposed, or to enforce a

of *National City v. Johnston*, 133 Cal. 185, 65 Pac. 383; *Union Sav. Bank v. Rinaldo*, 6 Cal. App. 637, 92 Pac. 873.

2. *San Gabriel etc. Water Co. v. Dennis*, 4 Cal. Unrep. 272, 34 Pac. 441 (form of resolution held sufficient).

3. *Imperial Land etc. Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

4. *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487;

Imperial Land etc. Co. v. Oster, 34 Cal. App. 776, 168 Pac. 1159; *Bottle Min. & M. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994; *National Paraffine Oil Co. v. Chappellet*, 4 Cal. App. 505, 88 Pac. 506.

5. *Shively v. Eureka etc. Min. Co.*, 129 Cal. 293, 61 Pac. 939.

6. *Imperial Land etc. Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

liability created by law, must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created.⁷ An action by a receiver of a national bank in another state to enforce an assessment upon the stockholders by the comptroller of the currency, against one of its stockholders resident in California, has been held to be an action to enforce a liability created by law within such provision, and to be barred by the lapse of three years after the liability is created, that is, three years after the expiration of the time within which the assessment was ordered to be paid.⁸ The matter of the accrual and limitation of a liability created by a call or assessment is considered, in part, in preceding sections of this article.⁹

Attack on Assessment.

§ 363. In General.

"No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made."¹⁰

7. Code Civ. Proc., § 359. See, as to constitutional liability of stockholders, *infra*, § 391.

8. *King v. Armstrong*, 9 Cal. App. 368, 99 Pac. 527, holding that other provisions of the same title in which Code Civ. Proc., § 359, is found are expressly inapplicable under that section.

VI Cal. Jur.—62

9. See *supra*, §§ 331, 332.

10. Civ. Code, § 347. See, also, Code Civ. Proc., § 341, subd. 2: Actions which must be brought within six months: "To recover stock sold for a delinquent assessment, as provided in section three hundred and forty-seven of the Civil Code." See, also, Civ. Code, § 348, as to

Accordingly, a sale of forfeited shares cannot be set aside on the ground of mere irregularities unless within a reasonable time a tender is made of the amount of the assessment.¹¹ Although in cases where the assessment is void and the directors had no power to levy it, a remedy by injunction has been granted restraining sale of stock thereunder,¹² and although there are intimations in the statute that collection of assessments may be enjoined,¹³ nevertheless where the assessment itself is regular and valid, but subsequent proceedings invalid, it has been held to be the duty of the stockholder to pay the assessment or offer so to do, failing which equity will not enjoin a sale,¹⁴ since irregularities under section 346 of the Civil Code are inoperative only against those proceeding under section 347, and it was intended that this should be the only remedy in case a valid assessment is not paid.¹⁵

proof of publication of notice and evidence of facts of the sale.

11. *American Well etc. Co. v. Blakemore*, 184 Cal. 343, 193 Pac. 773.

12. *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303 (where stock held nonassessable, injunction granted to restrain sale); *Younglove v. Steinman*, 80 Cal. 375, 22 Pac. 189; *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153 (void assessment). See *Sullivan v. Triunfo etc. Min. Co.*, 39 Cal. 459 (where question as to whether stockholder might enjoin the corporation from selling stock under an illegal assessment was raised but not decided); *Humphrey v. Buena Vista Water Co.*, 2 Cal. App. 540, 84 Pac. 296 (where assessment was void if allegations of complaint were true); *Aisbett v. Paradise etc. Mill Co.*, 21 Cal. App. 267, 131 Pac. 330 (where an action was

brought to annul assessment proceedings and to enjoin the sale of stock).

13. It may be inferred from Civ. Code, § 333, subd. 2, permitting levy of a second assessment where "the collection of the previous assessment has been enjoined," and the provision of § 345, permitting the extension of date of sale by entry on the records of the corporation, where the delinquent sale "is restrained by order of court," that injunction is a proper mode of attacking the validity and preventing the enforcement of an assessment.

14. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 939; *Stephens v. Lemoore Canal etc. Co.*, 22 Cal. App. 579, 135 Pac. 707.

15. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 939. See *Sullivan v. Triunfo etc. Min. Co.*, 29 Cal. 585 (holding that sale could not be enjoined if assess-

One may be estopped to question the validity of an assessment. Thus a director participating in the levy or reduction of an assessment is estopped to question the validity thereof.¹⁶

§ 364. Attacking Void Assessment.—A stockholder wrongfully deprived of his shares under a void assessment may either sue the corporation for their value or apply for a writ of mandamus to compel the corporation to open its books and permit the registry of the shares or to pay damages if the registry is impossible, or he may sue in an equitable action to vacate the sale and have the shares ordered to be delivered up and canceled and for other relief.¹⁷ Stockholders may also recover from the corporation amounts paid by them on a void assessment.¹⁸ In actions for recovery on account of improper assessments, section 347 of the Civil Code is applicable only when the action is grounded on irregularity in the assessment, irregularity or defect in the notice of sale, or defect or irregularity in the sale itself. Where the

ment did not exceed the amount allowed by law and was to pay proper and legal expenses).

16. *Campbell v. Santa Maria Oil etc. Co.*, 153 Cal. 282, 95 Pac. 39; *Ward v. California Celery etc. Co.*, 15 Cal. App. 84, 113 Pac. 888; *Auburn etc. Pavilion Assn. v. Hill*, 3 Cal. Unrep. 839, 32 Pac. 587. See *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107, holding that a demand for the return of an assessment paid by purchaser of stock, as a condition of rescission, where the purchaser voted for the assessment, was fatal to an offer to rescind.

17. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143 (pledgee has right to maintain such action, as the cer-

tificate is evidence of right and ownership and confers the right on pledge to protect his special interest in the stock). See *Hennesy v. Alleghany Min. Co.*, 159 Cal. 398, 113 Pac. 1071 (complaint in action to have assessment declared invalid and sale thereunder illegal and void must do more than allege in general terms that the order for assessment was illegal in that it contained matters and conditions not authorized by law; failing to allege in what the illegalities consisted, it will be held uncertain and demurrable).

18. *Huey v. Patterson*, 37 Cal. App. 335, 174 Pac. 939 (where under the facts recovery was denied).

assessment is not merely irregular, but is void, the corporation having no power to levy the assessment, the provisions of section 347 are not applicable.¹⁹ The invalidity must affect the assessment itself, otherwise it is a mere irregularity and section 347 is applicable.²⁰ In an action to annul an assessment, the burden is on the attacking party to show invalidity.¹

§ 365. Attacking Irregular Proceedings for Sale.—The remedy of one whose stock has been improperly sold for failure to pay an assessment is to sue for the recovery of the stock, not for a specific interest in the corporate property.² Where the proceedings for sale of delinquent stock are irregular the plaintiff must proceed under section 347 of the Civil Code to recover his stock,³ and it is therefore necessary before bringing suit first to pay or tender to the corporation or the party holding the stock the sum for which it was sold, together with all subsequent assessments paid thereon and interest on such sums from the time they were paid. This requirement is applicable to a plaintiff seeking to recover damages for conversion of stock instead of the stock itself,⁴ for there is no reason, it

19. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. See *Ruck v. Cal-edonia etc. Min. Co.*, 6 Cal. App. 356, 92 Pac. 194 (where order of assessment was defective and assessment held void, but not decided whether tender which plaintiff made was necessary). See *Glenn v. California Trona Co.*, 38 Cal. App. 601, 177 Pac. 178 (where assuming assessment invalid because not for proper purpose, it was held that Civ. Code, § 347, had not been complied with and no recovery could be had).

20. *Whitcomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887 (postponement of date of sale made at meeting not properly held, and consequently void, held mere irregularity not affecting assessment itself).

1. *Glenn v. California Trona Co.*, 38 Cal. App. 601, 177 Pac. 178.

2. *Smith v. Maine etc. Tunnel Co.*, 18 Cal. 111.

3. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 939.

4. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Myers v. Chittyna Exploration Co.*, 20 Cal. App. 418, 129 Pac. 469. See, also, *American Well*

has been said, why section 347 of the Civil Code should not be applicable to an action to recover damages for conversion, instead of the stock.⁵ Where the plaintiff knows the sale has been made to a purchaser, tender must be made to such purchaser and tender to the corporation itself is ineffectual.⁶ An offer to pay the assessment and costs is not sufficient where there is no tender made of the amount of interest also.⁷ This tender, as provided in section 347, is a condition precedent to recovery of the stock and should be made in such unequivocal terms that no bona fide dispute or misunderstanding regarding it can arise, and if the plaintiff does not do so, it being easily within his power, he cannot recover.⁸ But even where a tender is made, this is insufficient without an offer in the complaint to do equity by paying the assessment, for section 347 is no more than declaratory of the general rule of equity that a plaintiff seeking equity must do equity.⁹

§ 366. Limitation on Action Attacking Assessment.—

The code provides that no action to recover stock sold for delinquent assessments on the ground of irregularity may be sustained unless commenced by the filing of a complaint and the issuing of a summons thereon within six months after the sale was made.¹⁰ Although section 347 of the Civil Code is referred to as a statute of limitations,¹¹ it has not been decided whether this section is to be treated as such a statute, waived if not pleaded; but in any event

etc. *Co. v. Blakemore*, 184 Cal. 343, 193 Pac. 773 (as to general rule).

5. *Ward v. California Celery etc. Co.*, 15 Cal. App. 84, 113 Pac. 888.

6. *Stephens v. Lemoore Canal etc. Co.*, 22 Cal. App. 579, 135 Pac. 707.

7. *Campbell v. Santa Maria Oil etc. Co.*, 153 Cal. 282, 95 Pac. 39.

8. *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10.

9. *Glenn v. California Trona Co.*, 38 Cal. App. 601, 177 Pac. 178.

10. Civ. Code, § 347; Code Civ. Proc., § 341, subd. 2 (action to recover stock sold for a delinquent assessment, as provided in section 347 of the Civil Code, must be begun within six months).

11. *Newhall v. Hunsaker*, 38 Cal. App. 399, 176 Pac. 380.

the statute cannot be waived against an estate.¹² Independent of a statute limiting the right to begin an action to recover stock, one whose stock is sold may lose his right to relief by delay and acquiescence in the sale and by refusal of an offer to return the stock upon the payment of the assessment and of the amount owing the corporation.¹³ By section 346 of the Civil Code, of course, it is intended to declare that the irregular proceedings shall be inoperative to confer an indefeasible title to the stock against an owner who shall make tender of the assessment and bring suit for recovery within the time prescribed by section 347 of the Civil Code.¹⁴ In any event, the sale cannot be set aside after a lapse of many years. The failure to act within such period exhibits a lack of diligence justifying a court in refusing proof as to the invalidity of the sale. And an affidavit that the claimants had paid all the assessments of which they had any knowledge is not sufficient, where it does not assert that they had paid all the assessments levied, or that the assessment under which their stock was sold was illegal or void.¹⁵

XIV. LIABILITY OF STOCKHOLDERS AND MEMBERS FOR CORPORATE OBLIGATIONS.

General Considerations.

§ 367. **Basis of Liability.**—At common law, no individual liability for debts is imposed upon the members of a corporation, and it has been said that there is, there-

12. *Stephens v. Lemoore Canal etc. Co.*, 22 Cal. App. 579, 135 Pac. 707, citing section 1499 of the Code of Civil Procedure, which provides that no claim must be allowed by the executor or administrator or by a judge of the superior court which is barred by the statute of limitations.

13. *Sayre v. Citizens' Gas etc. Co.*, 69 Cal. 207, 7 Pac. 437, 10 Pac. 408.

14. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26, 17 Pac. 939.

15. *Matter of College Hill Land Assn.*, 157 Cal. 596, 108 Pac. 681.

fore, no department of the common law to which the courts may look for a rule as to the proportion of such liability.¹⁶ Therefore, except for statute, no personal liability attends the creation of a corporation.¹⁷ Under the constitution and statutes of California, there are two methods of proceeding by creditors of a corporation to collect their debts; first, each stockholder may be compelled to pay to the corporation calls to the full amount of his subscription; and secondly, each stockholder is liable individually to creditors for such proportion of ^{their claims} ~~his claim~~ as the amount of stock held by him bears to the whole of the subscribed capital stock. This second remedy is the only one which a creditor has against the stockholder directly and not through the corporation.¹⁸ The remedy of the creditor under the constitutional and statutory liability does not supersede the remedy by creditors' bill to recover the amount due the corporation on stock subscriptions. It merely furnishes an additional security and the remedies are concurrent.¹⁹

(See "Grobman",
1926 51 App. 486)

§ 368. Constitutional and Code Provisions.—The provision of the constitution imposing liability upon stockholders for the debts and liabilities of corporations is as follows:

16. McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; Green v. Beckman, 59 Cal. 545; French v. Teschemaker, 24 Cal. 518.

17. See *infra*, § 374. See note, 8 A. L. R., as to personal liability of stockholders for debts of corporation which has made unauthorized change of name.

18. Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70. See *supra*, §§ 311-316, as to persons liable on calls; *supra*, § 317, as to liability on calls dis-

tinguished from stockholder's statutory liability; *infra*, § 374 et seq., as to nature of stockholder's statutory liability; *infra* § 379 et seq., as to measure of liability and ascertainment thereof.

19. Sacramento Bank v. Pacific Bank, 124 Cal. 147, 71 Am. St. Rep. 36, 45 L. R. A. 863, 56 Pac. 787; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Harmon v. Page, 62 Cal. 448; Hiller v. Collins, 63 Cal. 235.

"Each stockholder of a corporation or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole subscribed capital stock, or shares of the corporation or association."²⁰

Substantially the same provision is made by section 322 of the Civil Code,¹ which contains further provisions as to the enforcement of the liability;² the discharge of the obligation of a stockholder by payment of his proportion of any debt due from the corporation, incurred while he was such stockholder;³ the method of determining the liability of each stockholder;⁴ the nonrelease of such liability by any transfers made subsequently to the time it was incurred;⁵ as to who are included in the term "stockholder," stating in this connection the rules respecting equitable owners,⁶ persons advancing installments or purchase money in the name of minors, guardians or other trustees who voluntarily invest trust funds in stock,⁷ and

20. Const. 1879, art. XII, § 3. It was specifically provided by amendment in 1908 that the provisions of this section should be inapplicable to companies organized to promote and carry on world's fairs, the liability of stockholders in any such company being limited to an amount not exceeding the par value of the stock of the corporation subscribed for by them.

1. Section 322 of the Civil Code has stood since 1905 without amendment, and since 1872 without substantial amendment, although the section as it originally stood was probably unconstitutional (see *Larabee v. Baldwin*, 55 Cal. 155). The amendment of 1905, according to the code commissioner's note, con-

sisted in the substitution of the language of the first sentence of section 3 of article XII of the constitution in place of the first sentence of the original section. In 1917, the section was amended to provide for a limited liability for stockholders, but this was contingent, however, upon the proposed amendment of the constitutional provisions. The latter amendment was defeated at the polls on a referendum vote. See *Stats.* 1917, pp. 786, 1975; *Stats.* 1919, p. lxxxii.

2. See *infra*, § 403.

3. See *infra*, § 411.

4. See *infra*, § 379 et seq.

5. See *infra*, § 412.

6. See *infra*, § 383.

7. See *infra*, § 388.

as to holders of stock in a representative capacity where the pledgor or person or estate represented is to be deemed the stockholder as respects such liability.⁸ The code also provides for the liability of members of corporations having no capital stock,⁹ and for the liability of the stockholders of foreign corporations doing business within the state.¹⁰

Where corporation has no capital stock.—Section 322 of the Civil Code provides in part as follows:

“In a corporation having no capital stock, each member is individually and personally liable for an equal share of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members to enforce such liability as by this section may be brought against one or more stockholders, and similar judgments may be rendered.”¹¹

§ 369. Constitutionality of Code Provision.—The provisions of section 322 of the Civil Code that a stockholder is liable to a creditor only for his proportion of that creditor's debt, have been held not to be in conflict with the provisions of the constitution that a stockholder is liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of his stock bears to the whole of the subscribed capital stock.¹² The constitution, while fixing the measure of liability of the stockholder does not provide any machinery for the enforcement of the creditors' rights. Under it, however, the legislature may provide that any creditor may bring a joint or several action to enforce his claim, as it has

8. See *infra*, § 389.

9. See *infra*, this section.

10. See *infra*, § 371.

11. The liability in a corporation without capital stock is, under the provisions of section 322, equally distributed among the members;

Upton v. Woman's Club of Kern, 19 Cal. App. 127, 124 Pac. 858.

12. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667; *Borland v. Haven*, 37 Fed. 394, 13 Sawy. 551. See *Larrabee v. Baldwin*, 35 Cal. 155, as to rule under the old constitution.

done.¹³ A statute relating to stockholder's liability enacted pursuant to the constitutional provision may be changed by the legislature without violating the prohibition against impairment of obligations of contract in view of the provisions of the constitution permitting alteration or repeal of corporation laws.¹⁴ The provision of the constitution, as it now stands, is clearly self-executing and mandatory,¹⁵ and any attempt by the legislature to limit its effect would be beyond its constitutional power, and therefore void.¹⁶ The provisions of section 322 of the Civil Code prior to the enactment of the constitution of 1879, not being inconsistent with the constitution, were continued in force by it.¹⁷

§ 370. Applicability to All Corporations.—The provisions of the constitution and statutes respecting the liability of stockholders apply to all corporations, whether formed prior to or after the adoption of the constitution.¹⁸ The provisions of an act which purports to declare that stockholders of the particular class of corporations formed under such act shall not be individually and personally liable for any portion of its debts and liabilities are invalid

13. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 867.

14. *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

The constitutional provision of 1849 was not self-executing; but the change by the constitution of 1879 to a self-executing provision did not violate the rule against impairing obligations of contract, since the former constitution contained provisions permitting the alteration or repeal of provisions relating to corporations; *Morrow v. Superior Court*, 2 Cal. Unrep. 124. See *French v. Teschemaker*, 24 Cal. 518 (holding Const. 1849, art. IV, § 36, not to be self-executing, since

it provided no rule as to the proportion of debts for which a stockholder should be liable). And see CONSTITUTIONAL LAW, vol. 5, p. 576 et seq., as to self-executing provisions generally.

15. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284; *Morrow v. Superior Court*, 2 Cal. Unrep. 124; *Id.*, 64 Cal. 383, 1 Pac. 354.

16. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284.

17. *Borland v. Haven*, 37 Fed. 394, 13 Sawy. 551.

18. *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

as in plain conflict with the constitution.¹⁹ And it has been said that an act authorizing the formation of a corporation without attaching to the corporators an individual liability would be as obnoxious to the constitution as would be the creation of a corporation by special act.²⁰

§ 371. Liability of Stockholders of Foreign Corporations, in General.—Section 322 of the Civil Code provides in part that

“The liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, is the same as the liability of a stockholder of a corporation created under the constitution and laws of this state.”

This provision is in obedience to the mandate contained in section 15 of article XII of the constitution that no corporation organized outside the state shall be allowed to transact business within it on more favorable conditions than are prescribed by law for similar corporations organized under the laws of the state. Stockholders seeking to avail themselves of the privilege granted to foreign corporations know, or should know, the terms upon which the privilege is tendered, and they cannot accept the advantages and repudiate the accompanying burdens.¹ Section 322 of the Civil Code does not violate the provisions of the constitution of the United States prohibiting the passage of laws impairing the obligation of contracts, for it is clear that the law referred to in the federal constitution must be one enacted after the making of the contract the

19. *Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

20. *French v. Teschemaker*, 24 Cal. 518.

1. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942 (corporation

formed in Arizona, but where the articles declared that the principal place of business outside Arizona should be in city of Los Angeles or Pasadena, at the option of the directors in the state of California); *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046.

obligation of which is claimed to be impaired.² Where the parties have some other law in view than the California law, and contract with reference to such other law, this may be shown by an express declaration to that effect, and in the absence of such declaration may be disclosed by the terms of the contract and the purpose for which it is entered into. Where the charter contract is so made, the liabilities imposed by the law of such other state will govern.³

The fact that the articles of incorporation expressly exempt stockholders from liability where they also expressly declare the purpose of doing business in California does not estop the creditors in California from enforcing the liability, since in such case the contract does not purport to apply such exemption to business done in California, and it must be assumed that the charter contract was made with reference to the laws of California, and the liabilities imposed by its laws. And in this connection it has been held that the extent of business done in California by the particular foreign corporation is immaterial.⁴ The United States supreme court has held that the liability may be enforced outside of California against a stockholder residing in another state.⁵

2. *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125, 22 Sup. Ct. Rep. 52, see, also, *Rose's U. S. Notes*; *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756 (construing the California statute). See *CONFLICT OF LAWS*, vol. 5, p. 467 (§ 40).

3. *Peck v. Noce*, 154 Cal. 351, 97 Pac. 865 (corporation organized in Nevada, although the articles declared that it was the purpose of the corporation to do business in California); *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125, 22 Sup. Ct. Rep. 52, see, also, *Rose's U. S.*

Notes (corporation organized in Colorado, the articles declaring that the principal plant and operations of company beyond the limits of state of Colorado should be in Los Angeles). See *CONFLICT OF LAWS*, vol. 5, p. 465.

4. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

5. *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. Rep. 312, see, also, *Rose's U. S. Notes* (see note on this case in 2 Cal. Law Rev. 315).

§ 372. Absence of Declaration to Do Business in California.—Express provision in the articles of a foreign corporation for the doing of business in California thereby makes the corporation the agent of the stockholder for making contracts within California in accordance with its laws; but without this authority from the stockholder, it is said that the corporation cannot make him answerable in a way not contemplated by the charter.⁶ If the articles declare that the corporation shall have authority to transact business in such places in the state of incorporation or in any other state or territory as the board of directors may deem necessary or expedient, the omission of express language is not sufficient to vary the ordinary rule of liability. In such case the stockholder impliedly consents that when directors select a place for the transaction of corporate business, they shall have power to bind him so far as the laws of that place may require.⁷

6. *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. Rep. 312, see, also, *Rose's U. S. Notes* (see note on case, 2 Cal. Law Rev. 315).

7. *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155 (see note on case in 4 Cal. Law Rev. 502). But see *Risdon Iron & Locomotive Works v. Furness*, [1906], 1 K. B., 49 contra. This was a case where an English corporation formed to operate mines in U. S. A., and other countries and places in any part of the world, by its articles authorized and empowered the directors to do all such things and to take such steps as should be necessary to comply with the statutes of any country or place where the company might carry on its business. The corporation actually did business and incurred debts in California. The English court held an

English stockholder not liable, on the ground that by becoming a member of the corporation, he did not authorize the directors to pledge his personal credit for the price of goods supplied the company, in the absence of express authority on his part. An English law journal (21 Law Quarterly Rev. 105) later suggested that the California court might arrive at a different conclusion, which it did in *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155. See *infra* as to the rule in the latter case.

See, in general, as to *Risdon* case, articles by W. N. Hokfeld, "Nature of Stockholder's Individual Liability for Corporation Debts," in which the result of the *Risdon* case is doubted, 9 Columbia Law Rev. 285 (April, 1909), and "The Individual Liability of Stockholders and the Conflict of Laws," 9

The test of liability has been said to be whether the stockholder has authorized the corporation and its officers to bind him by entering upon the transaction of business in a given state. Such authority is conferred as well by general language authorizing the transaction of business in any state which the directors may deem it expedient to enter, as by words empowering them to transact business in a specific place. Any other holding, it is argued, would make it easy for corporators, designing to conduct the corporate business in California, to escape the liabilities imposed by its laws through the simple expedient of using in their articles general instead of specific words in defining the purposes of the corporation and the places of intended operation.⁸

§ 373. Kinds of Obligations for Which Stockholder may be Liable.—The words “liability” as used in the constitution and Civil Code in respect to the liability of stockholders is a much more comprehensive term than the word “debt.” It is not restricted to such demands as would arise from the existence of obligations of a corporation which were then due and payable or presently enforceable—“debts contracted”—but refers rather to such legal obligations or “liabilities” as might be “incurred” by the corporation, although such liabilities might not be capable of enforcement except upon some contingency or in the future.⁹ Nor is the liability for obligations confined to debts and contractual liabilities; the language is broad enough to embrace involuntary obligations of the corpora-

Columbia Law Rev. 492 (June, 1909); 10 Columbia Law Rev. 283 (April, 1910), and 10 Columbia Law Rev. 520 (June, 1910); see, also, notes on the case in 6 Columbia Law Rev. 45; 18 Harv. Law Rev. 452; 21 Law Quarterly Rev. 105, and 22 Law Quarterly Rev. 122; and note to Provident Gold Min.

Co. v. Haynes, 173 Cal. 44, 159 Pac. 155, in 4 Cal. Law Rev. 502.

8. Provident Gold Min. Co. v. Haynes, 173 Cal. 44, 159 Pac. 155.

9. Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939. See note, 4 Cal. Law Rev. 243.

tion for negligence or tortious acts.¹⁰ Thus, stockholders are liable for their respective proportions of damages for personal injuries,¹¹ and the liability embraces actions to recover damages for death through negligence.¹² A stockholder is liable under section 322 of the Civil Code not only for his proportion of the debt of the corporation, but for interest on it as well,¹³ and he is also liable for his proportion of the costs of suit in a judgment against the corporation.¹⁴ But where the obligation is one which can properly be made only with the consent of two-thirds of the stockholders, although the corporation itself may be liable thereon, the stockholders are not liable if the obligation was incurred without such consent.¹⁵

Nature of Liability.

§ 374. In General.—The liability of stockholders exists only by reason of the constitution and the statute.¹⁶ And it must have its origin and inception in the act of the corporation.¹⁷ The identical act which casts liability on the

10. *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63 (see notes on case in 5 Cal. Law Rev. 248, 416). See *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315, holding stockholders liable for damages under the California law for maritime tort by a shipping company.

11. *Douglas v. Orth*, 30 Cal. App. Dec. 378, 185 Pac. 1005; *Damiano v. Bunting*, 40 Cal. App. 566, 181 Pac. 232; *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63.

12. *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808; *In re Putnam*, 193 Fed. 464.

13. *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *Knowles v. Sandereock*, 107 Cal. 629, 40 Pac. 1047;

Bridges v. Tefft, 35 Cal. App. Dec. 379, 200 Pac. 71 (holding, however, that interest on interest already included in the judgment cannot be allowed).

14. *Mokelumne Hill Canal etc. Co. v. Woodbury*, 14 Cal. 265; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71.

15. *Boyd v. Heron*, 125 Cal. 453, 58 Pac. 64 (issuance of bonds).

16. *Green v. Beckman*, 59 Cal. 545; *National City Bank v. Chubb*, 35 Cal. App. Dec. 211, 199 Pac. 537. See *infra*, § 393, as to liability created by law.

17. *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 300 Pac. 71; *Foreign Mines Dev. Co. v. Boyes*, 180 Fed. 594.

corporation also casts it on the stockholder.¹⁸ His liability commences at the same time as that of the corporation and continues during the existence of the indebtedness.¹⁹ The liability arises by operation of law from the creation and existence of the debt, not through any power of the corporation to bind the stockholder to a personal liability for its obligations; and the law does not authorize the corporation to represent the stockholder in setting up a defense against his personal indebtedness.²⁰

§ 375. Liability as Contractual.—Although it is held, so far as the statute of limitations is concerned, that the liability of the stockholder is one created by law,¹ and although the stockholder is, perhaps, not strictly liable on the contract with the creditor, but on the statute,² nevertheless, while statutory in origin, the liability is contractual in its nature.³ By force of the statute, if the corporation incurs a debt within the jurisdiction, the stockholder is a party to and joins in the contract in the proportion of his shares.⁴ An action against a stockholder under the provisions of section 322 of the Civil Code and under the constitutional provision is an action founded upon contract within the meaning of the provisions of the code govern-

18. *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.

19. *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Young v. Rosenbaum*, 39 Cal. 646; *Mokelumne Hill etc. Min. Co. v. Woodbury*, 14 Cal. 265.

20. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335.

1. See *infra*, § 393.

2. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

3. *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139; *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848 (opinion of Beatty, C. J., concurring); *Dennis v. Superior Court*,

91 Cal. 548, 27 Pac. 1031; *Damiano v. Bunting*, 40 Cal. App. 566, 181 Pac. 232; *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63; *Major v. Walker*, 23 Cal. App. 465, 138 Pac. 360; *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315; *Foreign Mines Dev. Co. v. Boyes*, 180 Fed. 594. And cases cited *infra*. See note, 8 A. L. R. 1198, as to validity of oral promise by stockholder to pay debt of corporation.

4. *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. Rep. 312, see, also, *Rose's U. S. Notes*, holding a foreign stockholder bound under Cal. Civ. Code, § 322.

ing attachments,⁵ as well as within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in actions arising upon contract for the recovery of money.⁶ The necessary legal effect of the provisions of the constitution and code is that individuals are permitted to transact business through the medium of a corporation, which, when created, becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation; the contracts which it thus makes bind the stockholder to the extent named.⁷

The liability being contractual, and not penal, survives the death of the stockholder, and is enforceable against his estate.⁸ And for like reason it may be enforced in other jurisdictions.⁹ The liability under statutes of another state for double liability is likewise contractual and not penal, being in the nature of a contract of guaranty, enforceable in any state in which jurisdiction of the stock-

5. *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139; *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885; *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

6. *Dennis v. Superior Court*, 91 Cal. 548, 27 Pac. 1031.

7. *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691. See *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756, action based upon liability of stockholder under Civ. Code, § 322, of California.

8. *Davidson v. Rankin*, 34 Cal. 503 (where liability was based on a tort); *Damiano v. Bunting*, 40 Cal. App. 566, 181 Pac. 232; *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63 (see note on case in 5 Cal. Law Rev. 416); *Major v. Walker*, 23 Cal. App. 465, 138 Pac. 360; *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315. See *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62, where liability under the California statute was enforced in the probate court of another state.

9. *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. Rep. 312, see, also, *Rose's U. S. Notes*; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62; *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

holder may be obtained.¹⁰ If a special remedy is given, however, and that remedy is not afforded by the laws of California, the liability cannot be enforced.¹¹

§ 376. Comparison With Partnership Liability.—It has been frequently declared that the members of a corporation who are answerable personally for corporate debts and liabilities, stand in the same position in relation to the creditors as if they were conducting their business as a common partnership.¹² California is one of the few states in which the liability of the stockholder is not collateral, but original, and in which it partakes of the nature of the liability of partners, so that an action at law lies directly against shareholders as against partners on their joint contract and need not be predicated on a judgment against the corporation.¹³ Although the analogy of the law of partnership applies to a certain extent, it has been held that the liability of the stockholders inter sese is not that of partners,¹⁴ since the liability is individual and personal, and not joint as between stockholders.¹⁵ And the liability of one stockholder is in no sense dependent or contingent upon the liability of others.¹⁶

10. *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1923.

11. *Russell v. Pacific Ry. Co.*, 113 Cal. 258, 34 L. R. A. 747, 45 Pac. 323. See *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756, holding that since no special remedy under section 322, Cal. Civ. Code, is provided, but merely an action at law, the liability is enforceable in other jurisdictions. And see *CONFLICT OF LAWS*, vol. 5, p. 416.

12. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Davidson v. Rankin*, 34 Cal. 503; *Robinson v.*

Bidwell, 22 Cal. 379; *Mokelumne Hill Canal etc. Co. v. Woodbury*, 14 Cal. 265; *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315.

13. *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315 (construing the California law). See *infra*, § 377.

14. *Brown v. Merrill*, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557.

15. *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354.

16. *Anderson v. Nawa*, 25 Cal. App. 151, 143 Pac. 555.

§ 377. **As Direct and Primary.**—While in many states the liability of stockholders for corporate debts is secondary and contingent on the insolvency of the corporation, and in others an existing judgment and exhaustion of the remedy thereon against the corporation is a prerequisite to pursuing the stockholder's liability,¹⁷ in California the liability is direct, immediate and enforceable independently of proceedings against the corporation.¹⁸ In equivalent phrase, the liability is primary,¹⁹ or original,²⁰ and not secondary.¹ Under the California law the liability is as distinct and separate as it would be if the act had made no provision for any other liability than that of the stock-

17. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335 (stating and reviewing the various rules).

18. *Favorite v. Superior Court*, 181 Cal. 261, 8 A. L. R. 290, 184 Pac. 15; *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354; *Faymonville v. McCollough*, 59 Cal. 285; *Young v. Rosenbaum*, 39 Cal. 646; *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315; *Dolbear v. Foreign Mines Dev. Co.*, 196 Fed. 646, 116 C. C. A. 338. And cases cited *infra*.

19. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Favorite v. Superior Court*, 181 Cal. 261, 8 A. L. R. 290, 184 Pac. 15; *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885; *Partridge v. Butler*, 113 Cal. 326, 45 Pac. 678; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac.

1047; *In re California Life Ins. Co.*, 81 Cal. 364, 22 Pac. 869; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Faymonville v. McCollough*, 59 Cal. 285; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71; *Seaboard Nat. Bank v. Belden*, 32 Cal. App. Dec. 282, 190 Pac. 1045; *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63; *Niles State Bank v. Jennings*, 22 Cal. App. 66, 133 Pac. 329; *Trinidad v. Atwater Canning etc. Co. (Cal. App.)*, 128 Pac. 756.

20. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71; *Niles State Bank v. Jennings*, 22 Cal. App. 66, 133 Pac. 329; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70; *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315.

1. *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71.

holder for the debts of the corporation,³ the direct relation of debtor and creditor being established between the stockholder and the creditor by the statute.³

As a consequence a stockholder is liable co-ordinately with the corporation, but one is not responsible before the other;⁴ and a creditor need not resort to the assets of the corporation before proceeding against the stockholder.⁵ The stockholder is, therefore, the principal debtor and is not a surety for the corporation,⁶ or a guarantor,⁷ or indorser.⁸ However, a stockholder may be liable under the

2. *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354,

3. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70. See *Miller & Lux v. Dunlap*, 28 Cal. App. 313, 152 Pac. 309, holding that the note of all the stockholders given in surrender of an old note of the corporation was supported by sufficient consideration, since the stockholders were personally liable for the payment of the old note.

A creditor of a corporation is a creditor of each stockholder, although he may not know one of them. *Regents of the University of California v. Turner*, 159 Cal. 541, 114 Pac. 842.

4. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

5. *Eva v. Andersen*, 166 Cal. 420, 137 Pac. 16; *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335; *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315.

6. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Young v. Rosenbaum*,

39 Cal. 646; *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427; *Mokelumne Hill etc. Min. Co. v. Woodbury*, 14 Cal. 265; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71; *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. Rep. 312, see, also, *Rose's U. S. Notes*; *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

A surety paying the corporate debt can look to the stockholder as a principal: *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094; *Ryland v. Commercial etc. Bank of San Jose*, 127 Cal. 525, 59 Pac. 989; *Myers v. Sierra Valley etc. Agr. Assn.*, 122 Cal. 669, 55 Pac. 689.

7. *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

8. *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.

Of course, the alteration of a note on which stockholders are indorsers, will release them where the action is against them as indorsers not as stockholders; *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21, 45 Pac. 12.

special terms of his contract both as a guarantor and upon his liability as stockholder.⁹

§ 378. As Separate and Distinct from Corporate Liability.—Although the liability of stockholders must have its origin and inception in some act of the corporation,¹⁰ it is distinct and separate from that of the corporation.¹¹ Since this is so, it is not necessary, in an action to enforce the liability, to join the stockholder with the corporation,¹² or the corporation with the stockholder;¹³ and the corporation is not injured by a dismissal of an action as to the stockholders.¹⁴ The corporation has nothing to do with the liability of stockholders after it arises. That is strictly a matter between creditors and stockholders, not as corporators, but as individuals;¹⁵ and it is not contingent on a recovery against the corporation.¹⁶ The corporation is powerless to extend a stockholder's liability by a new promise or by an agreement extending the period of the statute of limitations or by changing the form of indebtedness.¹⁷

9. *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; *Seaboard Nat. Bank v. Belden*, 32 Cal. App. Dec. 282, 190 Pac. 1045; *Union Trust Co. v. Journeay*, 29 Cal. App. 502, 156 Pac. 999.

10. See *supra*, § 374.

11. *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077; *Griffin & Skelly Co. v. Magnolia etc. Cannery Co.*, 107 Cal. 378, 40 Pac. 495; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71; *Foreign Mines Dev. Co. v. Boyes*, 180 Fed. 594. And see *supra*, § 377. And see *infra*, § 409, as to effect of security given by the corporation.

12. *Griffin & Skelly Co. v. Mag-*

*nolia etc. Cannery*Co.*, 107 Cal. 378, 40 Pac. 495.

13. *Trinidad v. Atwater Canning etc. Co.* (Cal. App.), 128 Pac. 756.

14. *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808.

15. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71; *Trinidad v. Atwater Canning etc. Co.* (Cal. App.), 128 Pac. 756; *Foreign Mines Dev. Co. v. Boyes*, 180 Fed. 594.

16. *Davidson v. Rankin*, 34 Cal. 503; *Mokelumne Hill etc. Min. Co. v. Woodbury*, 14 Cal. 265. See *supra*, § 377.

17. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335. See *infra*, §§ 395, 396.

An action against a stockholder and an action against the corporation, therefore, are not the same, and are not on the same cause of action; hence, a plea of another action pending against the corporation cannot be maintained in an action against the stockholder.¹⁸ Neither does the pendency of a receivership proceeding nor the insolvency of the corporation affect the right of a creditor to proceed against a stockholder.¹⁹ Likewise, a judgment against the corporation does not extinguish, merge or suspend the liability of stockholders. Indeed, a remedy against the corporation does not affect the stockholders, whose liability is contingent only in this, that there must be a subsisting obligation of the corporation.²⁰

Measure of Liability.

§ 379. **In General.**—Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities, contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation.¹ Section 322 of the Civil Code contemplates that a creditor may recover his claim in full from stockholders, and it would seem that their insolvency only could defeat such recovery. Every stockholder is liable for a certain proportion of the debt and the sum of the liabilities of all the stockholders is equal to the creditor's claim.² But, if sued by all the creditors separately, the aggregate re-

18. *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Union Trust Co. v. Journeay*, 29 Cal. App. 502, 156 Pac. 999. See ABATEMENT AND REVIVAL, vol. 1, p. 23 et seq.

19. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284.

20. *Young v. Rosenbaum*, 39 Cal. 646.

1. Const., art. XII, § 3; Civ. Code, § 322. See *supra*, § 368, as to liability of members where corporation has no capital stock; and see *infra*, § 404, as to who may enforce the liability of stockholders.

2. *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

covery against any one stockholder cannot exceed the sum all might recover in a joint action.³ The provision of the code that a stockholder is liable to each creditor only for his proportion of that creditor's debt is not a curtailment of the constitutional liability of the stockholder for his proportion of all debts and liabilities. The constitution fixes the liability, while the code section prescribes the manner of enforcement of the right of the creditor. The constitution, while fixing the measure of liability, does not provide any machinery for the enforcement of the creditor's rights, and under the constitutional provision the legislature may properly provide that the creditor bring a joint or several action to enforce his claim, as it has done, or may require, as is done in some states, that all creditors be joined in an equitable action. Either method, it has been said, would leave the stockholder's liability the same.⁴

Under the holdings prior to the adoption of the present constitution, and under the statutes then in force, a creditor might collect his whole claim from a single stockholder, provided it did not exceed in amount the stockholder's proportion of the corporation's entire indebtedness.⁵ But in adopting the new constitutional provision, there was not read into it the interpretation given under the old statute.⁶

§ 380. Stockholder's Proportion.—The proportion of the indebtedness of the corporation to a creditor for which he may sue is such as the stock of the stockholder bears to the whole subscribed capital stock of the corporation.⁷

3. *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354.

4. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667; *Borland v. Haven*, 37 Fed. 394, 13 Sawy. 551. See the dissenting opinion in *Larrabee v. Baldwin*, 35 Cal. 155, which conforms in substance to the present rule.

5. *Larrabee v. Baldwin*, 35 Cal. 155.

6. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667.

7. Civ. Code, § 322; *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354. See *infra*,

But if the liability is so small as to be trifling, the maxim "*de minimis non curat lex*" applies.⁸ It has been declared to be the clear design of the law that liability should be imposed in proportion to ownership of the capital stock, and where shares have the same par value, it is a matter of indifference whether the law declares that the liability shall be in proportion to the owned shares or in proportion to the owned capital stock. The law uses both phrases, however.⁹ A constitutional provision that a stockholder shall be individually liable for his proportion of all the corporate debts and liabilities is not self-executing,¹⁰ for it is manifest that such a declaration does not establish any rule by which any definite liability can be fixed.¹¹

In an action under section 322 of the Civil Code to enforce the liability, several things must be ascertained. First, the amount of the subscribed capital stock of the corporation must be proved.¹² Second, the court must determine the amount of this stock owned by the defendant stockholder,¹³ at the time the debt or liability was incurred.¹⁴ Third, the total amount of debts and liabilities of the corporation to the creditor must be ascertained. And fourth, the proportion of such debts or liabilities for which each stockholder is liable as determined by the proportion of stock he holds.¹⁵

§ 381, as to subscribed stock as basis.

8. *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670. See *ACTIONS*, vol. 1, p. 332.

9. *Film Producers v. Jordan*, 171 Cal. 664, 154 Pac. 605.

10. See *supra*, § 369.

11. *United States v. Stanford*, 69 Fed. 25, holding that a statute fixing such proportion definitely, but passed after the making of the

contract in question was inapplicable.

12. *Knowles v. Sanderecock*, 107 Cal. 629, 40 Pac. 1047; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354.

13. *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354.

14. *Huey v. Patterson*, 37 Cal. App. 335, 174 Pac. 939.

15. *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354.

§ 381. **Subscribed Stock as Basis.**—The respective liabilities of stockholders are proportionate to the subscribed capital stock; hence all the stock held by the stockholders must be equal to the subscribed capital stock.¹⁶ If any of the stock remains in the company's treasury, it is not subscribed capital stock, and the whole stockholder's liability will be incident to the remaining shares; and, where a corporation owns part of its own stock by reason of its ownership of all the stock of a second corporation which holds such stock, the situation is the same as if such stock were mere unissued treasury stock.¹⁷ In declaring upon the liability of stockholders the amount of the total subscribed stock must be shown.¹⁸ It is not sufficient to aver merely the total amount of the capital stock and the ownership by the defendant of a specified number of shares when the liability was created.¹⁹ And an averment of the amount "outstanding" is not the equivalent of the amount "subscribed," yet where it is evident that the pleader was endeavoring to set forth the total subscribed stock, that form of averment is merely imperfect or ambiguous.²⁰ Likewise, an averment that a certain number of shares were issued is not the equivalent of stating that only that

16. *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

17. *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63.

18. *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155.

19. *John A. Roebling's Sons Co. v. Butler*, 112 Cal. 677, 45 Pac. 6; *Bidwell v. Babcock*, 37 Cal. 29, 25 Pac. 752.

An allegation as to the number of shares subscribed, issued and outstanding, in the absence of special demurrer is a sufficient statement of the total amount of capital stock subscribed; *Hanson v. Sher-*

man, 25 Cal. App. 169, 143 Pac. 73.

20. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942. See *Southern California etc. Steel Co. v. Maier*, 36 Cal. App. 531, 172 Pac. 615, to effect that where the admitted allegations of the complaint raise no issue as to the number of shares "outstanding" when the debt was contracted, the plaintiff is not entitled to raise it by evidence contradicting the allegations of the complaint.

number was subscribed,¹ for stock subscribed, though not yet issued, bears its proportion of a creditor's debt.² In the absence of estoppel, where the corporate books fail to disclose an increased subscription of stock, by reason of which increase the liability is less than it otherwise would be, the stockholder is entitled to establish such fact and to insist that his liability be fixed upon such basis.³

§ 382. Time of Stockholding as Test.—The liability of a stockholder is limited to those debts or obligations contracted or incurred during the time he was a stockholder.⁴ The meaning of the code provision is that the debt or liability must accrue during the time the stockholder was such.⁵ Anyone who enters into business relations with a corporation may be presumed to contract with a view to the individual liability of stockholders. If he relies, as he has a right to do, upon the solvency and credit of the stockholders, he must necessarily look to those who are stockholders at the time he makes the contract, and not to those who may become such thereafter.⁶ A complaint must show affirmatively, therefore, that the indebtedness was incurred while the defendant was a stockholder,⁷ and must allege the date upon which the debt or liability was

1. San Francisco Commercial Agency v. Miller, 4 Cal. App. 291, 87 Pac. 630.

2. Smith v. Ferries etc. R. Co., 5 Cal. Unrep. 889, 51 Pac. 710.

3. Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

4. Const., art. XII, § 3; Civ. Code, § 322.

5. Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939 (upon a contract); Yule v. Bishop, 133 Cal. 574, 65 Pac. 1094 (the liability of stockholders to a surety who pays a corporate note is of those who were stockholders at the time of payment of the note);

Cockins v. Cook, 5 Cal. Unrep. 103, 41 Pac. 406; Harris v. Torrance, 34 Cal. App. Dec. 518 (hearing granted in the supreme court); and cases cited *infra*. See Larrabee v. Baldwin, 35 Cal. 155, for the same rule under the constitution of 1849 as applied to a judgment. As to when the debt or liability accrues, see *infra*, § 391, et seq.

6. Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939.

7. J. I. Case Plow Works v. Montgomery, 115 Cal. 380, 47 Pac. 108; National City Bank v. Chubb, 35 Cal. App. Dec. 211, 199 Pac. 537.

incurred.⁸ If the complaint shows that the defendant was a stockholder at the time of the creation of the indebtedness it is not demurrable because it also sets forth a subsequent account stated for the purpose of showing that the original debt was reduced.⁹ And, in the absence of special demurrer, a complaint may be sufficient though it may not appear therefrom that the defendant was a stockholder at the time the original indebtedness arose, but only at the time the balance was due.¹⁰

Where a complaint sets forth promissory notes and alleges that while said debts were contracted and incurred the defendant was a stockholder, it is sufficient, although uncertain in that it does not clearly appear that the indebtedness was created at the time when the notes were executed. In such case there is an inferential averment that they were created while the defendant was a stockholder.¹¹

Persons. Liable.

§ 383. **In General.**—Section 298 of the Civil Code provides:

“The owners of shares in a corporation which has a capital stock are called stockholders. If a corporation has no capital stock, the incorporators and their successors are called members.”

And section 322 of the Civil Code provides in part that

“The term stockholder, as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another.”

8. *National City Bank v. Chubb*, 35 Cal. App. Dec. 211, 199 Pac. 537. 10. *Cutting v. Oliphant*, 27 Cal. App. 120, 148 Pac. 940.

9. *Partridge v. Butler*, 113 Cal. 326, 45 Pac. 678. 11. *Whitehurst v. Stuart*, 129 Cal. 194, 61 Pac. 963.

Since the constitutional provision creating the stockholders' liability¹² is self-executing,¹³ any attempt by the legislature to limit its effect would be beyond the legislative power and therefore void. In this connection the words "owner" and "stockholder" are synonymous. And section 322 of the Civil Code affords no basis for a conclusion that it was the design of the legislature so to restrict the meaning of the term "stockholder" as to exclude from liability any person who, being sui juris, voluntarily accepts ownership of stock.¹⁴ The term "stockholder" must therefore be construed in the light of the definition in section 298 of the Civil Code, and the liability is predicated upon ownership.¹⁵ But it is said that there is no liability on a stockholder who holds stock under an invalid issue.¹⁶ It has not been determined whether one who purchased through fraudulent inducements can be held liable as stockholder for the period of time during which he held the stock.¹⁷

§ 384. Liability of Owner not of Record.—One who is the owner of stock is liable thereon even though there is no entry on the books of the corporation of the fact of his ownership,¹⁸ for the term "stockholder" or "owner" as

12. See *supra*, § 368.

13. See *supra*, § 369.

14. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284. But see *Smith v. San Francisco etc. R. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582, where it is said that the provision in § 298 of the Civil Code that the owners of stock are called stockholders does not admit of the construction that only those are stockholders who are owners of stock. That section does not purport to be a definition of the term "stockholder" or to limit its extent, as would

have been the case if it had said that the stockholders are those who own the shares of stock in a corporation, but is consistent with holding that others may be stockholders than merely those who are the owners of the stock.

15. *Shean v. Cook*, 180 Cal. 92, 3 A. L. R. 1042, 179 Pac. 185. See note on case, 7 Cal. Law Rev. 349.

16. *Boyd v. Heron*, 125 Cal. 453, 58 Pac. 64. See *infra*, § 390.

17. *Goodspeed v. Law*, 260 Fed. 497 (where the question was raised, but not decided).

18. *Duke v. Huntington*, 130 Cal. 272, 62 Pac. 510; *Hughes etc. Lum-*

used in the statute is not confined to one who appears on the books as such, but relates to the real owner, notwithstanding the fact that the stock stands in the name of another. Where, however, the holder of the record title is not the owner of the stock, his liability to creditors as such is based, not upon ownership, but upon grounds of estoppel.¹⁹ It is evident that the legislature in enacting section 322 of the Civil Code had in mind the provisions of section 324 of the Civil Code relating to transfers of stock upon the books and the effect of the books as evidence of ownership, for the term "stockholder" had already been defined.²⁰ It is not essential to liability that the owner shall have paid for his shares. One becomes owner upon subscribing for stock and is liable as such although the corporation has given him credit.¹ Likewise, to constitute one a stockholder, it is not necessary that the shares should have been issued.²

§ 385. Stockholder Appearing as Such on Books.—Generally speaking, the person who stands on the books of the corporation as a stockholder is liable for the debts of the corporation as such. The fact that the transfer to him was made simply to enable him to become an officer,³ or to qualify him as a director of the company, does not re-

ber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

19. Hughes etc. Lumber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871. See *infra*, § 386, for applications of the rule of estoppel.

20. Shean v. Cook, 180 Cal. 92, 3 A. L. R. 1042, 179 Pac. 185. See *supra*, § 186 et seq., as to transfers of stock.

1. Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110. But see *Bank of Yolo v. Weaver*, 3 Cal. Unrep. 569, 31 Pac. 160, holding that evidence that a person subscribed for stock

is not sufficient proof that he actually owns shares, where no certificate was ever issued and he did not pay or offer to pay for them, and there was no evidence that he bought on credit.

2. Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Thomas v. Wentworth Hotel Co., 16 Cal. App. 403, 117 Pac. 1041, 1046; Hughes etc. Lumber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871; San Francisco Commercial Agency v. Miller, 4 Cal. App. 291, 87 Pac. 630.

3. Wolf v. St. Louis etc. Water Co., 15 Cal. 319.

lieve him from responsibility.⁴ If the stock stands as his on the books of the corporation with his knowledge and consent he is the owner as to the creditors of the corporation,⁵ even though he is in fact a trustee, agent or pledgee of the real owner,⁶ for the rule exempting trustees or pledgees does not apply in favor of one holding stock in his own name unqualifiedly.⁷ So long as there is nothing to indicate that one does not hold as owner, he is subject to liability.⁸ But it has been said that any construction of section 322 of the Civil Code which would lead to the result that one would be precluded from showing that while, on the face of the corporate books, he appeared to be a stockholder, yet in fact he was not, is not to be considered.⁹

§ 386. When Stockholder on Books Excused from Liability—Estoppel.—Under the rule that where the holder of the record title to the stock is not the owner, his liability is based upon grounds of estoppel,¹⁰ where stock is issued to one who refuses to receive it and immediately endorses an assignment on the certificate and has no other relations with the corporation or the stock, such person can-

4. *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670.

5. *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 72 Pac. 734; *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227. See *supra*, § 126 et seq., as to corporate records as evidence of ownership.

6. *Shattuck etc. Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702.

7. *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702.

8. *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702.

If proof of holding of stock on the books is made, the burden of proving that one is not a stockholder is upon the record holder; *Hanson v. Sherman*, 25 Cal. App. 169, 143 Pac. 73.

9. *Shattuck & Desmond etc. Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248. See note, 3 A. L. R. 1049, as to liability of one whose name appears upon books as a stockholder without his consent.

10. See *supra*, § 384.

not be held a stockholder despite the fact that his name appears as such on the books,¹¹ and especially is this true where the creditors did not know that the name appeared as such upon the books at the time of extending the credit, for in such case there can be no estoppel.¹² Likewise, one who never accepted stock is not a stockholder liable to creditors, despite an entry by the secretary of the corporation on its books that such person is a stockholder.¹³ And the same is true where the secretary, in violation of instructions and without authority, issues a certificate to one individually without showing that he holds the stock as pledgee.¹⁴ But an owner has the right to assume that the proper entry has been made and no duty devolves upon the purchaser of stock to see that the entries are made in the corporate books; hence, in the absence of facts constituting an estoppel, his liability is unaffected by such neglect of duty on the part of the corporation.¹⁵ Nevertheless, an owner who claims to have transferred his stock cannot overcome the presumption of continued ownership, at least as to creditors, without proof that he has done all that might be reasonably expected of him to have his name removed from the books and thus to have placed himself in the position of an involuntary record holder.¹⁶

§ 387. Estates, Heirs, Legatees.—A creditor of a corporation may hold the executor of the estate of a deceased

11. *Shean v. Cook*, 180 Cal. 92, 3 A. L. R. 1042, 179 Pac. 185. See *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257, where the wife was held as stockholder with the husband, to whom an assignment had been made, her name continuing to appear as stockholder on the books of the company.

12. *Shean v. Cook*, 180 Cal. 92, 3 A. L. R. 1042, 179 Pac. 185.

13. *Shattuck & Desmond etc. Co.*

v. Gillelen, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

14. *Mudgett v. Horrell*, 33 Cal. 25.

15. *Hughes etc. Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

16. *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 194 Pac. 1024, per *Lennon, J.*

stockholder on the stockholders' liability for an indebtedness incurred after the death of the stockholder, even though such executor never had actual or physical possession of the certificate and never exercised any act of ownership over it and did not even know of its existence until after the creation of the indebtedness sued upon, where, upon the death of the stockholder, the stock vests in and becomes the property of the estate.¹⁷ But a legatee of shares of stock who, upon distribution of the estate, accepts such legacy, is liable to the creditors of the corporation upon the stockholder's liability for debts contracted after the death of the stockholder, but before distribution of the estate. The legatee having become the owner upon the death of the former stockholder, is liable for all debts created after the death.¹⁸

§ 388. Persons Holding Stock in Representative Capacity, in General.—It is provided in part by section 322 of the Civil Code that the term "stockholder" as used therein applies not only to persons appearing on the books as such, but also to

"every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian, or other trustee, who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian, or trustee, are not liable under the provisions of this section, by reason of any such investment; nor must the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment continues until that period. Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder

17. *Miller & Lux v. Katz*, 10 Cal. App. 576, 102 Pac. 946. See *Childs v. De Laveaga*, 150 Cal. 281, 89 Pac. 82, where the question was

raised but not decided. See *EXECUTORS AND ADMINISTRATORS*.

18. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284.

thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented, is to be deemed the stockholder, as respects such liability."

Where shares stand in the name of a person as trustee for his minor son, under the provisions of the code he is clearly liable thereon.¹⁹

§ 389. When Holder in Representative Capacity not Liable.—By section 322 of the Civil Code it was not intended to make one who simply holds stock as collateral security, or as trustee or in any other representative capacity, personally liable as a stockholder, except as otherwise expressly specified.²⁰ Thus, where shares are transferred to a trustee for the corporation, in pledge, as collateral for an indebtedness, this does not constitute the transferee a stockholder personally liable for the debts of the corporation,¹ for it is expressly provided by the code provision that the equitable owner, not the trustee or pledgee, is liable as stockholder.² The first part of section 322 of the Civil Code defines who are stockholders and liable as such and declares them to be those who appear on the books as such, and also equitable owners and certain other persons. In all such cases, the law itself stamps them as stockholders leaving no room for question as to their relation to the corporation or as to their liability to creditors. The section then declares that holders of stock as collateral security and in representative capacities are not liable as stockholders "except in the cases above mentioned,"

19. *Robinson v. Rispin*, 33 Cal. App. 536, 165 Pac. 979. See *Wolf v. St. Louis etc. Water Co.*, 15 Cal. 319, to the effect that a person holding stock in an implied trust was not within the exception of the corporation act of 1853, which applied only to express trusts.

20. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284.

1. *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

2. *La Habra Oil Co. v. Francis*, 35 Cal. App. 168, 169 Pac. 401.

which are obviously the cases where, as indicated, the law has in terms declared them to be such. Thus, the person holding stock of record is liable as a stockholder, although he is in fact but a pledgee,³ or trustee.⁴

§ 390. Corporations as Stockholders.—In case a subscription by one corporation to the stock of another is ultra vires and void, the subscribing corporation cannot be charged as a stockholder. A private corporation has no implied authority to become a stockholder in other corporations, for to own stock in another corporation is to engage in its business, and a corporation is expressly forbidden to engage in any business other than that expressly authorized in its charter or the law under which it is organized.⁵ So, also, the rule is that since a national bank is prohibited from becoming a stockholder in other corporations except under certain conditions to save itself from loss, the holding of stock, except under those conditions, is ultra vires and void, and under federal law the banking corporation does not become liable to creditors as a stockholder.⁶ However, where one corporation holds all of the stock of another, the former may be sued as stockholder for the debts of the latter.⁷ And stockholders cannot avoid any part of their statutory liability by reason of the fact that a portion of the corporation's own stock is held by a subsidiary or holding company. It makes no difference through what channel the ownership of the stock is

3. *Hurlbut v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734.

4. *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702.

5. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047, citing art. XII, § 9, of the constitution.

6. *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071 (in such case the

transaction being void, the doctrine of estoppel does not apply); *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 193, 17 Sup. Ct. Rep. 831, see, also, *Rose's U. S. Notes* (reversing *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039).

7. *Kieflhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691.

traced, whether through a holding company or an individual.⁸ And, likewise, a corporation may be sued for its proportion of the debts of another corporation in which it holds stock.⁹

Accrual and Limitation.

§ 391. In General.—Section 359 of the Code of Civil Procedure provides that the title relating to the time of commencing civil actions

“does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.”

It is obvious from the language of this section that it, and not section 338 of the Code of Civil Procedure is the law of limitation applicable to actions against stockholders of a corporation upon their liability as such. Indeed, subdivision 1 of section 338 refers to actions on a liability created by statute—that is, created by the legislature—whereas, the individual liability of stockholders is created by the constitution; and while such liability is one created by law, it is not a liability created by statute law.¹⁰ Section 359 is not in conflict with section 3 of article XII of the constitution, which prescribes the liability of stockholders, although the code section was enacted prior to the

8. *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63.

9. *R. H. Herron Co. v. Westside Electric Co.*, 18 Cal. App. 778, 124 Pac. 455.

10. *Martin v. Howe*, 35 Cal. App. Dec. 889, per Hart, J. (rehearing granted in supreme court). See *Benjamin v. Eldridge*, 50 Cal. 612,

in which it was held that under a statute providing that an action for death by wrongful act must be brought within two years after the death, an action against stockholders of a corporation was barred where not brought within the two year period. The effect of Code Civ. Proc., § 359, was not considered.

constitution. The code section does not attempt to relieve the stockholder from his liability under the constitution; it only limits the time within which an action may be brought, and this is not inconsistent with the constitutional declaration that such liability is imposed upon the stockholder.¹¹ As certificates of stock of many corporations pass frequently from hand to hand, it has been said that it could be assumed that the legislature intended to protect temporary stockholders from the power of officers of corporations and their creditors to extend indefinitely the enforcement of liabilities created while they happened to be holders of stock.¹²

Although defendants in an action to enforce liability erroneously plead another section of the statute of limitations, if it is clear that it was their intention to plead the bar of the statute and the period of time under the statute pleaded is the same as under section 359, the plea in effect is that the action is not brought within the period of time within which such actions must be instituted, namely, three years, and this is sufficient.¹³

§ 392. Exclusive Application of Statute.—Under the general rule of statutory construction that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the particular provisions relate, it has been held that, although section 351 of the Code of Civil Procedure excludes from the period within which

11. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85.

12. *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335, per *McFarland, J.*

13. *Martin v. Howe*, 35 Cal. App.

Dec. 889, rehearing granted in supreme court (where section 338 of the Code of Civil Procedure was pleaded). See *Miller v. Lane*, 160 Cal. 90, 116 Pac. 58 (where several sections were pleaded, including sections 338 and 359, Code Civ. Proc.). See LIMITATION OF ACTIONS.

actions may be commenced the time during which the defendant may be absent from the state, that section is inapplicable to actions against stockholders on a liability created by law.¹⁴ And by the same reasoning, the provisions of section 353 of the same code, that where the person against whom an action may be brought dies before the expiration of the time limited, such cause of action, if it survives, may be sued on after the expiration of such time and within one year after issuance of letters testamentary or of administration, does not apply to a suit against a stockholder on his statutory liability.¹⁵ The applicability of other titles of the code is not excluded, however. Thus, in the computation of the three years under section 359, section 12 of the Code of Civil Procedure requiring the exclusion of the first day is applicable.¹⁶

§ 393. Liability Created by Law.—It is now well established that, for the purpose of section 359 of the Code of Civil Procedure prescribing a limitation to actions, the stockholders' statutory liability is a "liability created by law."¹⁷ It has been declared that the code section will

14. *King v. Armstrong*, 9 Cal. App. 368, 99 Pac. 527. See *infra*, § 393, as to liability "created by law"; and see *STATUTES* as to the general rule of statutory construction referred to in the text.

15. *Damiano v. Bunting*, 40 Cal. App. 566, 181 Pac. 232. And see note on this case, 7 Cal. Law Rev. 346.

16. *Dingley v. McDonald*, 124 Cal. 90, 56 Pac. 790. See *TIME*.

17. *Chambers v. Farnham*, 182 Cal. 191, 187 Pac. 732; *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139; *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75; *Jones v. Goldtree Bros. Co.*, 142 Cal. 333, 77 Pac. 939; *Santa Rosa Nat. Bank*

v. Barnett, 125 Cal. 407, 58 Pac. 85; *Dingley v. McDonald*, 124 Cal. 90, 56 Pac. 790; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; *Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594, 37 Pac. 499; *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335; *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Green v. Beckman*, 59 Cal. 545 (where it is said: "Our attention has not been called to any provision of the statute which imposes any 'penalty' or 'forfeiture' upon a stockholder for any act as such, and no effect can be given to the words 'liability created by law' unless we apply it

not bear the construction that the statute does not begin to run until the discovery by the plaintiff of the facts upon which his cause of action depends. The actions therein referred to "must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created"; and the fair reading of this section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture. But in actions to enforce a liability created by law, the period is three years from the creation of the liability.¹⁸

§ 394. Time of Incurring as Time of Creation.—The liability of a stockholder being one created by law, the statute runs three years after the creation of that liability, and not three years from the time the liability becomes enforceable against the corporation,—¹⁹ that is, the liability of the stockholder accrues at the inception of the

to the liability which the law imposes when one becomes a stockholder, and thus establishes the relation to the creditors of the corporation to which the law affixes the responsibility"); *Newman v. Nickell*, 33 Cal. App. Dec. 610, 194 Pac. 710; *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487; *King v. Armstrong*, 9 Cal. App. 368, 99 Pac. 527; *O'Neill v. Quarnstrom*, 6 Cal. App. 469, 92 Pac. 391. See *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65, in which Chief Justice Beatty comments on the rule in *Hunt v. Ward*, *supra*.

18. *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139. (In this case Sloss, J. said: "It is true that in *Moore v. Boyd*, 74 Cal. 167, 171, 15 Pac. 670, the court assumed that the discovery of the facts started the period of limitation in an action on stockholders' liability.

The point was not, however, material to the decision. In later cases, the court seems to have taken it for granted that the section required an action like the one before us to be begun 'within three years after the liability was created.' . . . In none of the later decisions on the subject is there any suggestion that the discovery of the facts by the plaintiff has any bearing on the question of limitation"); *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487.

19. *Pryor v. Winter*, 147 Cal. 554, 109 Am. St. Rep. 162, 82 Pac. 202; *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335; *Kempton v. Floribel Land & Imp. Co.*, 31 Cal. App. Dec. 713, 189 Pac. 478; *Damiano v. Bunting*, 40 Cal. App. 566, 181 Pac. 232; *Smith v. Pillsbury*, 39 Cal. App. 240, 178 Pac. 719.

corporation's liability, and the statute commences to run from that date.²⁰ Under the statute a "liability" is created when a contract binding on it is made by the corporation,¹ independently of whether the liability is absolute or contingent² or of when the right to enforce it may accrue.³ Of course, the liability of the corporation and that of the stockholders may become enforceable at the

20. *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 194 Pac. 1024; *Chambers v. Farnham*, 182 Cal. 191, 187 Pac. 732; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71.

1. *Chambers v. Farnham*, 182 Cal. 191, 187 Pac. 732 (stating the doctrine as settled law); *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939; *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75 (which held the question settled by this line of decisions, upon the doctrine of stare decisis, the doctrine of *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335, having stood as settled law for twenty years upon a matter vitally affecting all who had acquired stock in corporations); *Eva v. Andersen*, 166 Cal. 420, 137 Pac. 16; *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 77 Pac. 939; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; *Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594, 37 Pac. 499; *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335 (holding that the liability of the stockholder is created "by the consummation of the contract, act or omission by which the liability is incurred"); *First Nat. Bank v. Consolidated Lbr. Co.*, 16 Cal. App. 267, 116 Pac. 680. See *Johnson v.*

Bank of Lake, 125 Cal. 6, 73 Am. St. Rep. 17, 57 Pac. 664, contra, holding that liability of the corporation was created at the time when services were fully performed, not when the contract was made. This case was overruled by the court in *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939. And see *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487, contra, overruled by *Chambers v. Farnham*, 182 Cal. 191, 187 Pac. 732, as opposed to *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939.

2. *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939.

3. *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939; *Smith v. Pillsbury*, 39 Cal. App. 240, 178 Pac. 719; *First Nat. Bank v. Consolidated Lumber Co.*, 16 Cal. App. 267, 116 Pac. 680. See misstatements in various cases to effect that the right of action against the stockholder accrues at the same time as against the corporation: *Miller v. Lane*, 160 Cal. 90, 116 Pac. 58; *Davidson v. Rankin*, 34 Cal. 503; *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110. And see *Stilphen v. Ware*, 45 Cal. 110, where it is said the statute begins to run when the debt is due.

same time.⁴ But there is a clear distinction between the creation of a liability and the accruing of a cause of action thereon; and section 359 of the Code of Civil Procedure, *ex industria*, emphasizes that distinction.⁵

The effect of this rule, together with the fact that the liability of the corporation and that of the stockholder are separate and distinct with different periods of limitation in most cases, is that a stockholder may be liable for his proportion of a debt of the corporation even after the cause of action against the corporation itself is barred;⁶ and the statute of limitations may have run against the stockholders' liability before it has run against the corporation,⁷ or even before it has accrued against the corporation.⁸ It has been said that if the creditor chooses to

4. *Kempton v. Floribel Land etc. Co.*, 31 App. Dec. 713, 189 Pac. 478; *Douglas v. Orth*, 30 Cal. App. Dec. 378, 185 Pac. 1005 (personal injuries); *O'Neill v. Quarnstrom*, 6 Cal. App. 469, 92 Pac. 391.

5. *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335. See *Pryor v. Winter*, 147 Cal. 554, 109 Am. St. Rep. 162, 82 Pac. 202, stating that under section 312 of the Code of Civil Procedure, civil actions can be commenced only within the periods prescribed after the cause of action accrues, the only different rule prescribed being under section 359, which refers solely to actions against directors and stockholders. And see *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164, referring to the distinction between the liabilities of the corporation and the stockholder.

6. *Green v. Beckman*, 59 Cal. 545 (while the liability of a corporation on an oral contract is barred in two years, stockholder's liability not barred for three years). And

see *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164, where the question was raised but not decided as to whether a stockholder might avail himself of the fact that the liability of the corporation was barred as a defense to his own liability; in the particular case, the bar of the statute as to the corporation had been prevented by a written acknowledgment of the liability.

7. *Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594, 37 Pac. 499; *Ryland v. Commercial etc. Bank of San Jose*, 127 Cal. 525, 59 Pac. 989. See cases cited *infra*, § 401, as to deposits, on which there is no statute of limitations against the corporation.

8. *McKee v. Title Ins. & Tr. Co.*, 159 Cal. 206, 113 Pac. 140; *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65; *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335. See note in 7 Cal. Law Rev., p. 346, discussing the rule as declared in *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335, and

make a contract with the corporation, by which its payment of the indebtedness is postponed beyond the three years' limitation in favor of the stockholders, he must be deemed to have waived his right upon the stockholder's liability.*

§ 395. Effect of a Note or Account Stated.—In case a promissory note is given by a corporation, the liability of stockholders is not upon the note, but upon the original indebtedness evidenced thereby;¹⁰ and to recover against stockholders on the note the plaintiff should allege and prove that their liability was created at the time of giving the note for the first time, that is, at the time of the incurring of the original indebtedness.¹¹ A complaint which states the date on which a note was made, and contains no allegation as to the date on which the original indebt-

the application thereof in *Damiano v. Bunting*, 40 Cal. App. 566, 181 Pac. 232.

9. *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335, per *McFarland, J.* And see *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65, in which the rule is discussed by Chief Justice Beatty.

10. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75; *Eva v. Andersen*, 166 Cal. 420, 137 Pac. 16; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85; *Winano Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077; *Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594, 37 Pac. 499 (the incurring of the liability is at least as early as the execution of the note); *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335; *Bedington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; *Huey v. Patterson*, 37 Cal. App.

335, 174 Pac. 939; *Clark v. Berlin Realty Co.*, 33 Cal. App. 50, 164 Pac. 333.

The stockholders are not parties to the notes executed by the corporation and have no responsibility thereon; *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077; *National City Bank v. Chubb*, 35 Cal. App. Dec. 211, 199 Pac. 537.

11. *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *J. I. Case Plow Works v. Montgomery*, 115 Cal. 380, 47 Pac. 108; *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077. See *Whitehurst v. Stuart*, 129 Cal. 194, 61 Pac. 963, where it did not appear whether or not the indebtedness was created when the notes were executed, but where by inference it appeared that the liabilities represented by the notes were incurred while defendant was a stockholder.

edness was incurred is, therefore, insufficient.¹² Where the liability is created by the giving of a note, it is incurred at the time of the execution of the note, not at the maturity thereof;¹³ and liability on a bond is incurred at the time of the issuance of the same by way of pledge, not from the time of the sale of same as a pledge.¹⁴

The renewal of notes of the corporation does not affect nor extend the liability of stockholders on the original obligation unless the new notes created a new liability and the stockholders sued were stockholders when the new notes were given.¹⁵ And such renewals do not revive the liability of stockholders on the original obligation after it is barred.¹⁶ Hence, where new notes are not taken under an agreement that they shall constitute payment of the original obligation, suit is properly brought upon the original obligation even though the original notes evidencing the obligation were surrendered.¹⁷

Likewise, the making of an account stated does not affect the liability of stockholders nor create a new liability unless it is in discharge of the old one.¹⁸

§ 396. Effect of Judgment Against Corporation.—Under the statute no recovery of a judgment against the corpora-

12. *National City Bank v. Chubb*, 35 Cal. App. Dec. 211, 199 Pac. 537.

13. *First Nat. Bank v. Consolidated Lbr. Co.*, 16 Cal. App. 267, 116 Pac. 680; *O'Neill v. Quarnstrom*, 6 Cal. App. 469, 92 Pac. 391.

14. *Smith v. Pillsbury*, 39 Cal. App. 240, 178 Pac. 719.

15. *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *O'Neill v. Quarnstrom*, 6 Cal. App. 469, 92 Pac. 391.

The execution of a new note to take the place of an old one *prima facie* is not payment unless it is

expressly so provided; *Newman v. Nickell*, 33 Cal. App. Dec. 610, 194 Pac. 710. See *infra*, § 398, as to effect of payment or extinguishment of contract generally.

16. *Goodall v. Jack*, 127 Cal. 258, 59 Pac. 575; *O'Neill v. Quarnstrom*, 6 Cal. App. 469, 92 Pac. 391.

17. *Seaboard Nat. Bank v. Belden*, 32 Cal. App. Dec. 282, 190 Pac. 1045; *Clark v. Berlin Realty Co.*, 33 Cal. App. 50, 164 Pac. 333. See *Bonestell v. Bowie*, 128 Cal. 511, 61 Pac. 78.

18. *Partridge v. Butler*, 113 Cal. 326, 45 Pac. 678.

tion is required as a condition precedent to an action against a stockholder on his statutory liability.¹⁹ The liability is not based upon a judgment, but upon the original liability to the creditor which can be enforced directly against the stockholder.²⁰ By securing judgment against the corporation, the creditor waives none of his rights against stockholders on their individual liability,¹ nor does any liability accrue upon a judgment against the corporation, and such judgment does not extend the time for bringing action against the stockholder,² even where it is upon an unliquidated tort liability.³

§ 397. Unilateral Contracts.—The rule that the date of the incurring of a contractual obligation by a corporation is the date of the contract has reference only to those cases wherein an obligation, either absolute or contingent, is assumed by the corporation by the very making of the contract itself. It has been said that instances are not uncommon of contracts which, when made, are purely unilateral and under which one of the parties assumes no obligation whatever until the happening of some event entirely within the control of such party. An example is where a contract is made to sell upon certain fixed terms

19. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71.

A defendant stockholder is not injured by the entry of a judgment in an action against the corporation and the stockholder in a fixed sum against both, since payment by the one is a discharge of the other pro tanto; *Taughner v. Richmond Dredging Co.*, 33 Cal. App. 303, 165 Pac. 31 (where the defendant stockholder owned practically all of the stock).

20. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335. See *supra*, § 377.

1. *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315.

2. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Stilphen v. Ware*, 45 Cal. 110; *Young v. Rosenbaum*, 39 Cal. 646; *Larrabee v. Baldwin*, 35 Cal. 155; *Davidson v. Rankin*, 34 Cal. 503; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71.

3. *Douglas v. Orth*, 30 Cal. App. Dec. 378, 185 Pac. 1005; *Damiano v. Bunting*, 40 Cal. App. 566, 181 Pac. 232; *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63; *In re Putnam*, 193 Fed. 464.

such specified goods or articles as the vendee may subsequently order. Under such a contract, no obligation is incurred by the vendee until an order for the goods is given, and if the vendee is a corporation, the statute of limitations as to the liability of stockholders for the price of the goods begins to run from the date of the order and not from the date of the original contract.⁴ But in a decision of the appellate court it has been held that upon a contract with a corporation by which it was agreed to deliver goods at a stated price per barrel, to the plaintiff as ordered by him, the corporation later refusing to perform except at a higher price, the liability, if any arose, must have arisen out of the contract, and that the statute began to run at the date thereof as against stockholders.⁵

§ 398. Effect of Extinguishment of Contract.—Where an original obligation of a corporation has been extinguished and a new and implied contract to repay moneys had and received by the corporation is thereupon incurred, an action upon the stockholder's liability incident to the new obligation where brought within three years from the time of the inception of the latter obligation, is not barred by section 359 of the Code of Civil Procedure.⁶ And so, when the liability on the original contract has been extinguished by rescission of the contract for failure on the part of the corporation to perform the liability of the corporation to return money received by it is not necessarily barred within three years from the date of the contract. In such a case the action is not on the

4. *Chambers v. Farnham*, 182 Cal. 191, 187 Pac. 732 (concurring opinion of Olney, J.).

In such cases, it would seem clear that until the ordering of the goods, there is nothing more than an offer in existence, not a contract. See *CONTRACTS*, ante, p. 213.

5. *Pidgeon v. San Diego Consol.*

Brewing Co., 32 Cal. App. Dec. 372, 190 Pac. 1048.

6. *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71; *Kempton v. Floribel Land & Imp. Co.*, 31 Cal. App. Dec. 713, 189 Pac. 478.

original contract, upon which the obligation of the stockholders as well as that of the corporation was fixed at its date, but upon an entirely new obligation to repay money, which is not incurred until the plaintiff elects to relieve the corporation from the old obligation, and has waived his claims for equitable relief and for damages for its breach by the corporation.⁷ A further application of the rule may be instanced in cases where an accommodation indorser of a corporation note pays the same, a new obligation of the corporation being thereupon incurred to reimburse him.⁸

§ 399. Creation of Right of Surety or Guarantor.—

When a surety pays the note of his corporation principal, he has an action against the stockholders under section 322 of the Civil Code.⁹ And when a stockholder pays the debt of the corporation to protect his interests therein, and not to extinguish his stockholder's liability, he is to be regarded as a surety paying the debt of the corporation.¹⁰ The liability of stockholders to sureties is not incurred at the time of giving of the notes upon which they are sureties, but rather at the time they pay the debt of the corporation or some part of it.¹¹ The law implies an agreement on the part of stockholders to indemnify a surety whenever he pays the obligation, and this implied agreement is distinct from their liability to the payee. The fact

7. *Kempton v. Floribel Land & Imp. Co.*, 31 Cal. Dec. 713, 189 Pac. 478, per Brittain, J. (holding the case to be within the reason of the case of *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094). See RESCISSION.

If the obligation were merely for money had and received, it would be incurred at the time the money was actually received. See to this effect, *Green v. Beckman*, 59 Cal. 545; *Cutting v. Oliphant*, 27 Cal.

App. 120, 148 Pac. 940. See MONEY RECEIVED.

8. See *infra*, § 399.

9. *Myers v. Sierra Valley etc. Agr. Assn.*, 122 Cal. 669, 55 Pac. 689. And cases cited *infra*. See, also, SURETYSHIP.

10. *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40,

11. *Ryland v. Commercial etc. Bank of San Jose*, 127 Cal. 525, 59 Pac. 989; *Wills v. Woolner*, 21 Cal. App. 528, 132 Pac. 283.

that the payee's action against stockholders is barred, therefore, does not bar the surety's action against them.¹² On payment of a note by a surety, it is extinguished as to the corporation and its stockholders and there can be no legal or equitable assignment or subrogation to the extinguished note and the surety has no cause of action on it.¹³ But where, after the lapse of three years from the creation of a debt of the corporation upon a loan secured by its note and that of the directors as joint makers, there was a change of obligees upon the giving of a new note with the directors signing as sureties, this, it has been held, did not operate to change the liability of the original signers, or entitle the directors to avail themselves to their advantage of the rule governing payments by sureties.¹⁴

There is a marked distinction between a contingent liability and a right contingent upon the happening of an event to enforce an existing liability. In the one case, there is no liability until the happening of the event, the occurrence of which creates the liability, while in the other the liability exists, but the right to enforce it depends upon the contingency. Thus, where a corporation payee of a note sells the note before its maturity and at the same time executes and indorses on the back of the note a guaranty of payment, the liability of stockholders on the guaranty is created at the time the contract of guaranty is executed and the corporation obligated to make the payment, not at the date of the maturity of the note.¹⁵

§ 400. Breach of Covenants in Lease.—In actions upon a stockholder's liability for damages for breach of covenants contained in a lease, the liability of the corporation for breach of the covenant is not incurred at the time of

12. *Ryland v. Commercial etc. Bank of San Jose*, 127 Cal. 525, 59 Pac. 989.

14. *O'Neill v. Quarnstrom*, 6 Cal. App. 469, 92 Pac. 391.

13. *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094. See SURETYSHIP.

15. *First Nat. Bank v. Consolidated Lbr. Co.*, 16 Cal. App. 267, 116 Pac. 680, per Shaw, J.

the breach, nor at the time the damage is suffered, but is incurred at the time of the execution of the lease, notwithstanding no right of action could accrue until a breach. In such case the claim is one on the contract for damages for a breach thereof, not upon an implied contract created by law.¹⁶ In the determination of the time of the creation of a liability by reason of the terms of a lease, there is a recognized distinction between the nature of the liability imposed upon an assignee of a lease who takes possession under a bare assignment thereof and that assumed by an assignee who, in addition to accepting an assignment, expressly agrees to be bound by the covenants of the assigned lease. The lease has two sets of rights and obligations, one comprising those growing out of the relation of landlord and tenant, and based on the privity of estate, and the other comprising those growing out of the express stipulations of the lease, and based upon privity of contract.¹⁷ If the action is brought upon the contract, the liability arises when the contract is made, as by the express agreement of an assignee to be bound by the lease, or it may be that the contractual relation will be implied from the mere exercise of options contained in the lease without any express adoption of its covenants. But in the case of an assignee corporation, the stockholders' liability upon covenants in the lease is created when the contractual relation is created, as for instance, by giving notice of an option to extend the terms of the lease.¹⁸

16. *Chambers v. Farnham*, 182 Cal. 191, 187 Pac. 732 (overruling *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487). See note, 4 Cal. Law Rev., p. 245. And see cases cited supra, § 394, to the general rule as to the time of incurring liability.

17. *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 194 Pac. 1024, per Lennon, J. See LANDLORD AND TENANT.

18. *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 194 Pac. 1024. But see *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487, contra, holding in a case where the lease had been assigned and the corporation assignee had assumed all obligations of the lease, that liability was not created at time of assignment and assumption of liability, but at time of breach of lease. This last cited case was overruled, however,

§ 401. Miscellaneous Liabilities.—With reference to the right of action against a corporation or its stockholders, a liability for money had and received is incurred at the time the money is actually received,¹⁹ and a liability of a bank for deposits arises at the time of accepting the money on deposit.²⁰ The liability of stockholders to pay an overdraft arises at the time the overdraft is made.¹ And their liability to respond in damages for personal injuries arising out of acts of the corporation is created at the time the injuries are actually received, not the time a judgment is secured against the corporation determining its liability.²

§ 402. Application of Payments to Debts.—If, at the time of payment of an obligation, the debtor manifests to the creditor an intention or desire to have the payment applied toward the extinction of a particular obligation, it must be so applied; if no such application be then made, the creditor within a reasonable time may apply it toward the extinction of any obligation due from the debtor at the time of payment; and if neither party makes such application, it must be applied first to the extinction of interest due, then of principal due, and then of the obligation earliest in date of maturity.³ Under these code rules, the court may apply payments in discharge of obligations

in *Chambers v. Farnham*, 182 Cal. 191, 187 Pac. 732, as being opposed to the rule of *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939. See *supra*, § 394.

19. *Green v. Beckman*, 59 Cal. 545; *Cutting v. Oliphant*, 27 Cal. App. 120, 148 Pac. 940.

20. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75; *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 77 Pac. 939 (the liability is not affected by a change of deposit from one department to another, the depositor drawing his check for the pur-

pose); *Nellis v. Pacific Bank*, 127 Cal. 166, 59 Pac. 830; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Walker v. Woodside*, 164 Fed. 680, 90 C. C. A. 644.

1. *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85.

2. *Douglas v. Orth*, 30 Cal. App. Dec. 378, 185 Pac. 1005; *In re Putnam*, 193 Fed. 464.

3. Civ. Code, § 1479. See PAYMENT.

made more than three years prior to the time the application is made and thereby release the liability of stockholders upon such obligations. And so it has been held that the making and acceptance of a note for an agreed amount will be regarded as an agreement for the application of payments to the extinction of so much of the liability theretofore incurred as is not included in the note.⁴ A stockholder, not being the debtor, has no right to specify, when payments are made, how they shall be applied. The corporation has that privilege, but if it does not exercise it, the creditor has the right to make the application within a reasonable time, and if it makes no application of the payments to separate debts, but merely credits them generally, it is the duty of the court to apply the payments under the code provisions.⁵

Actions to Enforce.

§ 403. In General.—Section 322 of the Civil Code provides in part that

“Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered in conformity therewith.”

It will be noticed that the statute does not prescribe any peculiar remedy, but leaves the creditor to his remedy at law, by joint or several action against the stockholders.⁶

4. *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164. 394, 13 Sawy. 551. See *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756, citing *Mokelumne Hill Canal etc. Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646; *Sonoma Valley Bank v. Hill*, 59 Cal. 1078; *Morrow v. Superior Court*, 64 Cal.

5. *Los Angeles Trust & Sav. Bank v. Forve*, 31 Cal. App. Dec. 44, 187 Pac. 438.

6. *Myers v. Sierra Valley etc. Agr. Assn.*, 122 Cal. 669, 55 Pac. 689; *Borland v. Haven*, 37 Fed.

If no kind of action were prescribed by the statute, it has been said that the recourse of the creditor would be a suit in equity whereby all creditors would be brought in as parties so that each might receive his distributive share of the fund created for the benefit of all. But whether the law provides an action joint and several (as the California law provides), or whether it requires all creditors to be joined in an equitable action (as in some states), the liability of the stockholder remains the same.⁷ The remedy of creditors against the stockholders may be changed by provision of statute without impairing the obligation of contracts in view of the provision of the constitution that the repeal or alteration of provisions of statute relating to corporations may be made at any time by the legislature.⁸ If, therefore, the remedy provided exists under the laws of California, the liability is enforceable.⁹ But where the remedy is given under the laws of another state, is purely special, and does not exist under the laws of California, it cannot be enforced.¹⁰

§ 404. Creditors' Right—Right of Assignee.—Any creditor of a corporation may sue upon a stockholder's liability,¹¹ such right being personal to the creditor and

383, 1 Pac. 354, and *Borland v. Haven*, 37 Fed. 394, 13 Sawy. 551, to the California rule.

7. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 687.

The liability of every stockholder is fixed by statute with absolute precision, and there is no necessity to go into a court of equity. *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62 (determining the liability of an Arkansas stockholder in a California corporation under Cal. Civ. Code, § 322, where the corporation had become insolvent).

8. *Morrow v. Superior Court*, 2

Cal. Unrep. 124, referring to and construing the provisions in art. XII, § 1, of the present constitution, and the corresponding provisions in art. IV, § 4, of the constitution of 1849.

9. *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023. See, also, *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756, construing the California law.

10. *Russell v. Pacific Ry. Co.*, 113 Cal. 258, 34 L. R. A. 747, 45 Pac. 323. See **CONFLICT OF LAWS**, vol. 5, p. 465.

11. Civ. Code, § 322.

not for the benefit of the corporation,¹² or forming any part of its property or assets.¹³ And any creditor-stockholder may sue other stockholders for their pro rata of his claim.¹⁴ Under the constitutional provision, a creditor may not only enforce his right in an action at law, but may insist upon having the collected proceeds applied in liquidation of his debt, and the legislature may not deprive him of his right to enforce the liability and receive the undiminished proceeds.¹⁵ The liability must accrue to the creditor and cannot exist as to anyone who is not a creditor;¹⁶ but an assignee of the right of the creditor may sue,¹⁷ even though he is not the real party in inter-

12. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335.

13. *People v. Bank of Shasta County*, 172 Cal. 507, 157 Pac. 606; *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335; *Williams v. Carver*, 171 Cal. 658, 154 Pac. 472; *Williams v. Carver*, 42 Cal. App. 382, 183 Pac. 669.

14. *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Brown v. Merrill*, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557; *Schmidt v. Miller*, 35 Cal. App. Dec. 79, 199 Pac. 49; *Tower v. Wilson*, 30 Cal. App. Dec. 965, 188 Pac. 87 (holding that one of the original incorporators may enforce the liability of stockholders, even though the corporation is, as between the original incorporators, a trustee, or instrumentality of a joint venture); *Borland v. Haven*, 37 Fed. 394, 13 Sawy. 551 (either a stockholder or director may become a creditor of the corporation).

15. *Williams v. Carver*, 171 Cal. 658, 154 Pac. 472; *Williams v. Carver*, 42 Cal. App. 382, 183 Pac. 669. See *supra*, § 368, for constitutional and code provisions.

16. *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611.

17. *Spreckels v. Butler*, 128 Cal. 645, 61 Pac. 378 (holding that the fact that a loan was made indirectly and that a note was later indorsed to the real party in interest was not a defense to the action); *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611.

The assignment of the debt transfers the original indebtedness of the corporation and vests legal title thereto in the assignee: *De Moulin v. Magnesite Ref. Co.*, 61 Cal. Dec. 751, 199 Pac. 42; *Elhison v. Henion*, 183 Cal. 171, 11 A. L. R. 444, 190 Pac. 793; *Goldman v. Murray*, 164 Cal. 419, 129 Pac. 462; *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047. And this is the rule, though a note itself is void as to the corporation because of want of authority for its execution; *Goldman v. Murray*, 164 Cal. 419, 129 Pac. 462. See *ASSIGNMENTS*, vol. 3, p. 279, as to assignment of debt and incidental rights.

See *Irish v. Sunderhaus*, 122 Cal. 308, 54 Pac. 1113, holding that the allegation that the claim was duly

est.¹⁸ Where an assignment of the debt has been made, the original creditor cannot maintain an action upon it, for it no longer belongs to him.¹⁹

§ 405. Joinder of Parties and Causes of Action.—Since the joinder in one action of a cause against the corporation for its liability and against the stockholders for their statutory liability manifestly makes for the expeditious disposition of litigation without working a hardship on any party defendant, and the practice is not forbidden, it should be allowed.²⁰ If the debt be established as that of the corporation, when an action to recover the same is brought, stockholders who were such when the debt was contracted may be joined as parties defendant.¹ Under section 322 of the Civil Code, stockholders are properly joined in one action, but the corporation is not a necessary party to the action.² And where the action is brought

assigned to plaintiff before the commencement of the action was sufficient, in the absence of a special demurrer, without an allegation that he was still the owner of the assigned claim.

18. *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611, holding that it is immaterial that the original creditors remain real parties in interest, where no defense could have been made if the action had been by them.

19. *Ellison v. Henion*, 183 Cal. 171, 11 A. L. R. 444, 190 Pac. 793.

20. *Avery v. Chucawalla Dev. Co.*, 175 Cal. 644, 166 Pac. 1002.

The liability of a stockholder attaches to and attends that of the corporation: *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846. See **ACTIONS**, vol. 1, p. 345 et seq.

1. *Avery v. Chucawalla Dev. Co.*, 175 Cal. 644, 166 Pac. 1002 (where

several counts set forth the various claims against the corporation, the final count alleging all matters going to make up the causes of action against the corporation and then charging the defendant stockholders with their proportionate shares of liability under the law); *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846 (where the joinder was made but the question as to its propriety was not raised); *Kiefhaber Lumber Co. v. Newport Lbr. Co.*, 15 Cal. App. 37, 113 Pac. 691. See *Griffin & Skelly Co. v. Magnolia etc. Co.*, 107 Cal. 378, 40 Pac. 495 (which held joinder unnecessary, but did not decide whether a joinder could be had). And see *R. H. Herron Co. v. Westside Elec. Co.*, 18 Cal. App. 778, 124 Pac. 455, where joinder was made.

2. *Greenleaf v. Jacks*, 133 Cal. 506, 65 Pac. 1039.

against the corporation, since the liability of stockholders is distinct, it is not necessary to join them with the corporation.³ For like reason, the corporation is not injured by the dismissal of a stockholder who has been joined.⁴

Under the statutory provisions there may be as many diverse issues made and as many trials had resulting in several judgments as there are separate defendants; hence the disposition of the case of one defendant has no effect upon the right and duty of the court to "ascertain the proportion of the claim or debt for which each defendant is liable," and to render judgment "in conformity therewith."^{4a}

§ 406. Jurisdiction and Venue.—The usual rules as to jurisdiction of courts apply to actions against stockholders to enforce their statutory liability for their proportions of debts contracted by the corporation. Thus, if the amount sued for is less than three hundred dollars, the superior court has no jurisdiction of the action.⁵ Conformably to the general rule that jurisdiction is determined by the demand of the complaint made in good faith, it has been held that the superior court is not divested of jurisdiction in an action for more than three hundred dollars by the subsequent establishment of a defense to the whole or part of the claim.⁶ Likewise, the usual rules as to venue apply to actions against stockholders. Thus,

3. *Griffin & Skelly Co. v. Magnolia etc. Co.*, 107 Cal. 378, 40 Pac. 495.

4. *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808.

4a. *Grimwood v. Barry*, 118 Cal. 274, 50 Pac. 430.

5. *Myers v. Sierra Valley etc. Agricultural Assn.*, 122 Cal. 669, 55 Pac. 689; *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820; *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487. See

COURTS, § 7 et seq., as to jurisdiction of courts generally.

The personal liability of the stockholder is an obligation arising upon contract within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to justices' courts where the claim is less than three hundred dollars; *Dennis v. Superior Court*, 91 Cal. 548, 27 Pac. 1031. See COURTS.

6. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75.

where the action is against the stockholders in the county in which the cause of action arose, and where some of the defendants reside, nonresident defendants cannot, without the unanimous consent of all the defendants, affect a change of the place of trial to the county of their residence.⁷

§ 407. Pleading and Proof of Indebtedness in General.

In suing a stockholder upon his liability, the debt to be alleged is the debt of the corporation or the contract of the corporation out of which the liability arose.⁸ The chief fact to be established in such a suit is the indebtedness of the corporation. When that is established, the liability of the stockholder results as a necessary consequence. It would seem, therefore, that any evidence which is competent and sufficient to show the liability of the corporation must be competent and sufficient to show the liability of the stockholder.⁹ And since the corporation is the agent of the stockholders to make contracts and incur liabilities binding on them to the extent named in the statute, the rule that the admissions of an agent made while in the performance of his duty and which are a part of the *res gestae* may be proved against the principal, is applicable.¹⁰ But since the liability of the stockholder is primary and wholly independent in character, the indebtedness for which he is liable cannot be shown by the admissions of the corporation, such as are contained in the

7. *Greenleaf v. Jack*, 135 Cal. 154, 67 Pac. 17.

8. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Foreign Mines Dev. Co. v. Boyes*, 180 Fed. 594.

9. *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Borland v. Haven*, 37 Fed. 394, 13 Sawy. 551.

10. *McGowan v. McDonald*, 111

Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418, citing *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110, as holding there is no error in admitting in evidence a judgment against the corporation for the purpose of establishing its indebtedness and the liability therefor of its stockholders.

See *infra*, § 408, as to judgment against corporation as evidence.

books of the company, over which the stockholder can exercise no control.¹¹

§ 408. Judgment Against Corporation as Evidence.—It is an established rule in California that a judgment against the corporation is not conclusive evidence of the liability of the stockholder. And while, logically, the same grounds of reasoning would perhaps forbid admitting such judgment as *prima facie* evidence, there is persuasive authority and strong grounds of public policy for giving at least presumptive weight to such evidence. Inasmuch as the obligation of the corporation and its stockholders arises on the same state of facts as to both, there is a strong presumption at least that the corporation has interposed every meritorious defense that would avail the stockholder on his statutory liability.¹² Treating the judgment as *prima facie* evidence of the existence of the corporate liability would, it is said, leave open to the stockholder any meritorious defense to the original obligation, without requiring the creditor in every instance to preserve and produce anew the evidence in support of his claim, which in most cases could not be successfully rebutted, but which it might be difficult to reproduce.¹³ And this reasoning is supplemented by the provisions of

11. *Neilson v. Crawford*, 52 Cal. 248. But see *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418, holding that the same reasoning does not apply to reject as evidence the pass-books of depositors in a bank which are the books of the depositors and not of the corporation.

12. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335, per Sloane, J. But see *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71, in which it is said that because of the original and primary nature of the liability, there are grave doubts as

to whether under the statute the corporation would have power to represent its stockholders as to the individual liability—referring to opinion of district court of appeals in *Ellsworth v. Bradford*, 32 Cal. App. Dec. 50. See *supra*, § 378, as to nature of liability.

13. *Ellsworth v. Bradford*, 62 Cal. Dec. 1, 199 Pac. 335. See *Chambers v. Farnham*, 182 Cal. 191, 187 Pac. 732, where the question as to whether a judgment against the corporation is proof in an action against the stockholder was raised but not decided.

the code that where the question in dispute between the parties is the obligation or duty of a third person, whatever would be evidence for or against such person is prima facie evidence between the parties.¹⁴ Of course, where the liability of the corporation first arises upon judgment, as, for instance, a judgment for costs of suit, the judgment-roll is evidence to prove liability on the part of the stockholder.¹⁵

Even though a judgment against the corporation be deemed inadmissible, there is no prejudicial error in admitting it where, independently of such judgment, the indebtedness and the stockholder's liability for his proportionate share thereof are fully established by other evidence.¹⁶

§ 409. Effect of Security Given by Corporation.—Since the liability of the corporation is separate and distinct from the liability of the stockholder,¹⁷ the possession of security by the creditor is immaterial when the stockholder is sued for his proportion of the debt.¹⁸ The stockholder is not injured or benefited by the giving of security,¹⁹ and his liability is not limited to the deficiency arising upon foreclosure thereof.²⁰ Neither is the liability of the stockholder affected by the fact that a mortgage exists which has not been foreclosed, or by the fact that an action on the debt could not be brought because of section 726 of the Code of Civil Procedure which provides that there can be but one action for the recovery of a debt secured by mortgage, to wit, foreclosure of the mortgage.

14. Code Civ. Proc., § 1851.

15. *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71.

16. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Bridges v. Tefft*, 35 Cal. App. Dec. 379, 200 Pac. 71.

17. See *supra*, § 378.

18. *Sonoma Valley Bank v. Hill*, 59 Cal. 107.

19. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Niles State Bank v. Jennings*, 22 Cal. App. 66, 133 Pac. 329.

20. *Niles State Bank v. Jennings*, 22 Cal. App. 66, 133 Pac. 329.

This affects only the remedy against the mortgagor corporation not that against the stockholder.¹

§ 410. Evidence as to Stockholders.—The books of the corporation, when properly identified, are admissible to show the names of subscribers or stockholders and the amount of stock issued by the corporation, although such books are not named as the code requires.² But the fact that there are other stockholders may be shown.³ To make a prima facie showing, however, the entry must be in the corporate books.⁴ The books are competent evidence to prove the number of shares subscribed for and issued at the time the alleged indebtedness arose and the persons who were the shareholders.⁵

Discharge by Payment, Release or Waiver.

§ 411. Discharge by Payment.—Section 322 of the Civil Code in part provides that

“If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt, and if an action has been brought against

1. Knowles v. Sanderecock, 107 Cal. 629, 40 Pac. 1047; Dolbear v. Foreign Mines Dev. Co., 196 Fed. 646, 116 C. C. A. 338. See note, 1 Cal. Law Rev. 61.

2. Knowles v. Sanderecock, 107 Cal. 629, 40 Pac. 1047; Zierath v. Claggett, 31 Cal. App. Dec. 406, 188 Pac. 837.

3. Zierath v. Claggett, 31 Cal. App. Dec. 406, 188 Pac. 837.

4. Hanson v. Sherman, 25 Cal. App. 169, 143 Pac. 73.

5. Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089. But see Mudgett v. Horrell, 33 Cal. 25, where it was held that even under a statute making stock books presumptive

evidence of the facts therein stated against the stockholders, such books were not admissible to prove that one was a stockholder, since that fact must be established before the books become presumptive evidence of any fact against him.

A showing that stock was held at a prior time, however, in the absence of evidence to the contrary, raises a presumption that the same condition continues to exist: Huey v. Patterson, 37 Cal. App. 335, 174 Pac. 939. And see McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418, as to admission in the pleadings of the fact that he is a stockholder.

him upon such debt, it must be dismissed, as to him, upon his paying the costs, or such proportion thereof as may be properly chargeable against him.”

This provision permits a stockholder to discharge his statutory liability without waiting to be sued, and payment is a bar to an action to collect anything further.⁶ But where voluntary payments were made by stockholders of the amount of their supposed proportionate liability of all the debts of the corporation, and such payments were made to the president of the corporation, for the benefit of the creditors, but were not paid to the corporation, and the money was not in its possession, it has been held that such payments did not authorize the president to pay out the money in satisfaction of any one debt, and did not discharge a note of the corporation for which other stockholders were sued upon their proportion of liability therefor.⁷ Whatever satisfies or extinguishes the debt of the corporation extinguishes also the liability of the stockholder, because the creditor can claim only one satisfaction,⁸ and the insolvency of the corporation does not re-

6. *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319 (distinguishing from liability for unpaid balance of subscription); *Brown v. Merrill*, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557.

7. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047. See *People v. Bank of Shasta County*, 172 Cal. 507, 157 Pac. 606, where money was paid to a liquidating officer of the corporation, and was held not taxable to the corporation, but if taxable at all, it was as money belonging to each stockholder in proportion to his contribution.

8. *San Jose Savings Bank v. Pharis*, 58 Cal. 380; *Young v. Rosenbaum*, 39 Cal. 646.

The liability may be discharged by the giving of a new note or

obligation, if the effect is thereby to discharge the original obligation and create a new one, but unless such is the effect of the transaction, the liability on the original indebtedness continues: *Ellison v. Henion*, 183 Cal. 171, 11 A. L. R. 444, 190 Pac. 793 (notes for open accounts); *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164 (taking guaranty does not discharge liability of stockholder); *Partridge v. Butler*, 113 Cal. 326, 45 Pac. 678 (account stated); *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62 (renewal notes).

The surrender of old notes is not, however, conclusive that it was the intention to extinguish the old obligations as to stockholders and

quire the application of a different rule.⁹ However, the liability of a stockholder is only for his proportion of such part of the debt or liability as remains unpaid.¹⁰ So whenever a debt of the corporation is satisfied in part there is also a pro tanto discharge of the liability of the stockholder.¹¹ And as payments by the corporation discharge the liability of stockholders, payments by stockholders likewise discharge the corporation pro tanto.¹²

Under the old statute making the liability joint or joint and several, it was held that a release of a stockholder from all personal liability was a discharge of the corporation and other stockholders to the same extent as the one to whom the release was made, although if the release were only for the stockholder's proportion, the corporation and other stockholders were released only pro tanto.¹³

§ 412. Effect of Transfer of Stock.—The statute expressly provides that the liability of the stockholder is not released by any subsequent transfer of stock.¹⁴ Bear-

create a new one; *Seaboard Nat. Bank v. Belden*, 32 Cal. App. Dec. 282, 190 Pac. 1045; *Clark v. Berlin Realty Co.*, 33 Cal. App. 50, 164 Pac. 333.

9. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284.

10. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284.

11. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284 (dividends paid by a receiver to the creditors operate as a discharge pro tanto); *San Jose Savings Bank v. Pharis*, 58 Cal. 380 (sale of mortgaged or pledged property discharges the stockholder to extent that he is liable only for his proportion of the indebtedness after the payments of the receipts from the sale have been credited).

A stockholder is entitled to the benefit of a reduction of the debt, and thus if an account stated reduces the debt, his liability is diminished accordingly, although his liability is not upon the account stated, but on the original indebtedness; *Partridge v. Butler*, 113 Cal. 326, 45 Pac. 678.

12. *Taughner v. Richmond Dredging Co.*, 33 Cal. App. 303, 165 Pac. 31.

13. *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.

14. Civ. Code, § 322; *Danielson v. Yoakum*, 116 Cal. 382, 48 Pac. 322 (holding that a transferee voluntarily paying debts accrued before the transfer of the stock and for which, therefore, he is not liable, cannot recover back such voluntary payment from his transferor).

ing upon this rule it is to be noted that the constitution itself imposes the liability upon the stockholder "individually and personally" for his proportion of the corporate debts and liabilities incurred during the time he was a stockholder.¹⁵ In a case where it was contended that a judge of the superior court had been an owner of stock in the corporation defendant prior to a date mentioned, and that he was and continued thereafter to be disqualified by reason of such fact so long as his direct liability as a stockholder continued to exist, it has been held that there was no ground for disqualification where there was no sufficient allegation of ownership in him; it is not sufficient to effect disqualification on this ground that the pleadings show that his wife was the owner.¹⁶

The question as to whether a transfer, made to an irresponsible person, for the purpose of escaping liability on future debts, will have the effect of relieving the transferor of liability for his proportion of such future debts has not been decided in California.¹⁷

§ 413. Right to Contribution or Reimbursement.—Since the liability of stockholders is several, when one has paid his proportion of a debt of the corporation, he has no cause of action against other stockholders therefor;¹⁸ neither may he look to the corporation for reimburse-

15. Const., art. XII, § 3; *People v. California Safe Deposit & Tr. Co.*, 18 Cal. App. 732, 124 Pac. 558. See *supra*, § 368 et seq.

16. *Favorite v. Superior Court*, 181 Cal. 261, 184 Pac. 15 (holding, also, that there was no disqualification under section 170 of the Code of Civil Procedure). See *Mokelumne Hill etc. Min. Co. v. Woodbury*, 14 Cal. 265, holding, under the old rules where interest disqualified witnesses, that one was disqualified as a witness in an action on a debt

while he was a stockholder, even though he transferred the stock before trial.

17. See *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670, where the question seems to have been presented, but where the evidence did not support the contention. See *supra*, § 316, as to transfer to insolvent transferee.

18. *Brown v. Merrill*, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557.

ment.¹⁹ And in such case he has no right to recover against a guaranty fund liable for the debts of the corporation.²⁰ Where a stockholder has paid more than his share, there is no liability on the corporation to reimburse him, for payment of a greater amount is a voluntary contribution which cannot be recovered.¹ Assuming that the person paying is not the owner of the stock, if he sees fit to pay in order to avoid litigation, that is sufficient consideration, and a payment thus voluntarily made with knowledge of the facts affords no ground for an action to recover it back.²

Under the rule that a stockholder is forbidden by law to share in the funds of an insolvent corporation, either by subrogation or otherwise, it has been held that where he has been compelled to pay his proportionate share of a creditor's claim, he is not entitled to be subrogated to the creditor's right to dividends from the funds of such corporation.³ But where the corporation is without funds, a payment of the full amount of its debt by a stockholder in good faith and for the use and benefit of the corporation under a legitimate and fair effort to protect his own interest in the property entitles him to contribution from other stockholders to the extent of their proportions, and the paying stockholder is subrogated to the remedies of a creditor, the payment not being voluntary within the rule denying the right of subrogation and contribution in cases of voluntary payments.⁴ And where a statute

19. *Trinidad v. Atwater Canning* etc. Co. (Cal. App.), 128 Pac. 756.

20. *In re California Mut. Life Ins. Co.*, 81 Cal. 364, 22 Pac. 869.

1. *Upton v. Woman's Club of Kern*, 19 Cal. App. 127, 124 Pac. 858. See PAYMENT.

2. *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891.

3. *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 71 Am. St. Rep. 36, 45 L. R. A. 863, 56 Pac. 787.

4. *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40. But see *Harris v. Torroance*, 34 Cal. App. Dec. 518, where, on rehearing in the supreme court it was held that stockholders making an agreement to pay the note of the corporation in consideration of an extension of time of payment could not recover from other stockholders their proportionate amount, where the agreement was executed by the

makes stockholders jointly and severally liable for a tax, a stockholder is liable to contribute his proportion to other stockholders who have paid the tax in full for which all are liable.⁵ So, under the former statute making the liability of stockholders to creditors a joint liability, if a creditor recovered the whole amount from certain stockholders, they had the right of contribution against the remaining stockholders for their proportions.⁶

§ 414. Waiver of Liability by Creditor.—The liability of a stockholder does not involve such a principle of public policy that it may not be waived,⁷ except, however, in the case of banking corporations, for it has been specifically provided by the Bank Act that the corporation may not make contracts with depositors waiving the stockholder's liability.⁸ Ordinarily, though the question is one as to private right only,⁹ and the rule is that a creditor of the corporation may by express contract waive his right to the stockholder's liability,¹⁰ or he may agree to limit or

stockholders of their own volition without any request on the part of the board of directors or other authority by the board. See CONTRIBUTION, ante, p. 497; PAYMENT.

5. *Wolters v. Henningsan*, 114 Cal. 433, 46 Pac. 277; *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077.

6. *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.

7. *Lum v. American Wheel etc. Co.*, 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. E. A. 619, 48 Pac. 1090; *French v. Teschemaker*, 24 Cal. 518,

8. See *BANKS*, vol. 4, p. 147. Prior to the enactment of the Bank Act, the liability of stockholders to depositors in a savings bank was subject to modification or waiver

by contract of the parties; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. E. A. 619, 48 Pac. 1090, holding, however, that liability was not waived by an unsigned agreement printed in the pass-books of a bank, nor by a printed release inserted in the signature book to which no special subscription is made by the depositor.

9. *French v. Teschemaker*, 24 Cal. 518. See *People v. California etc. Trust Co.*, 160 Cal. 374, 117 Pac. 321, where a provision in the contract was made for the purpose of working a waiver of the stockholders' liability, but where its effect as such waiver was not decided.

10. See generally cases cited in this section.

qualify the extent of his recourse to such liability.¹¹ So, corporations, by inserting a stipulation in all their contracts, may effectually guard stockholders from all liability for debts of the company.¹² And the fact that such liability is founded upon a constitutional provision makes no difference, for a party may waive a constitutional provision made for his benefit as well as a statutory provision.¹³ But the corporation may not make such a waiver by providing in its by-laws that stockholders shall not be held to their constitutional liability, since such a by-law is void as in conflict with the constitution and statutes of the state.¹⁴

XV. OFFICERS AND AGENTS GENERALLY.

Qualification, Appointment and Tenure.

§ 415. **In General.**—An office in a corporation has been defined as a position of trust or authority in regular and continued employment. A director is an officer and his duties make the position one of the highest trust and authority in connection with the affairs of the corporation.¹⁵

11. *Robinson v. Bidwell*, 22 Cal. 379 (opinion of Crocker, J., concurring). See *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1, to the effect that the corporation is liable whether the stockholders are exempt or not.

12. *French v. Teschemaker*, 24 Cal. 518.

13. *French v. Teschemaker*, 24 Cal. 518; *Robinson v. Bidwell*, 22 Cal. 379, opinion of Crocker, J., concurring. See CONSTITUTIONAL LAW, vol. 5, p. 626.

14. Civ. Code, § 303; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. B. A. 619, 48 Pac. 1090 (holding that the legislature

itself is without power to alter or limit the effect of the constitutional provision by exempting corporations therefrom).

15. *Lynip v. Alturas School Dist.*, 29 Cal. App. 158, 155 Pac. 109.

The statute itself creates the office. Civ. Code, § 290; and see Civ. Code, § 303, subd. 6, where it is assumed that directors are officers; *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516. See *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191 (where it is assumed that directors are officers), and see *Meriman v. Wickersham*, 141 Cal. 567, 75 Pac. 180 (where the court uses the phrase "director or other officer").

The rules of law as to election of directors by stockholders have already been considered in connection with the meetings and elections by stockholders.¹⁶ Consequently here are treated only such matters as pertain to qualification for, and tenure of office, of directors,¹⁷ their powers, the management of corporate affairs,¹⁸ their fiduciary relationship to the corporation and the stockholders,¹⁹ and their right to compensation.²⁰

§ 416. Qualifications of Directors.—Under section 305 of the Civil Code it is provided that a majority of the directors must be, in all cases, residents of the state of California, and that directors of corporations for profit must be holders of stock therein to an amount to be fixed by the by-laws of the corporation, and that directors of all other corporations must be members thereof. Section 303 of the same code provides that the by-laws may declare the qualifications of directors. And so where the by-laws fix the minimum holding necessary to qualify a stockholder for the office of director, one who does not hold the required number of shares is not qualified and may properly be disqualified by an election committee. The subsequent acquirement of the stock by one who has been disqualified will not oust the stockholder selected in his stead.¹⁻² Even though the by-laws fix no amount of stock as necessary to qualify a stockholder for election as a director, still, under the provisions of the code that the directors must be selected from the stockholders, a director must be a stockholder. He must hold stock in some amount or his election is invalid and he is not a director *de jure*; nor will the fact that he is given stock a long

16. See *supra*, § 281.

17. See *infra*, §§ 416-422.

18. See *infra*, § 425, as to *de facto* officers; *infra*, § 439, as to interested director as part of quorum; *infra*, § 440 et seq., as to their management of corporate affairs; and *infra*,

§ 503, as to execution of instruments by directors.

19. See *infra*, § 444 et seq.

20. See *infra*, §§ 463, 464.

1-2. *Waterbury v. Temescal Water Co.*, 11 Cal. App. 632, 105 Pac. 940.

time after the day of election cure the invalidity of his election.³ The claim that one is a director, therefore, necessarily admits his status as a stockholder.⁴ But, although one not qualified is obviously not a director *de jure*, there is nothing to prevent his becoming a director *de facto*, if he assumes the office and acts as a director.⁵

§ 417. Holding Stock Merely to Qualify.—As a general rule, where the statutes, charter, or by-laws governing the corporation provide that directors shall be stockholders, it is essential to render a person eligible to the office of director that he be an owner of stock in fact. While the courts are not disposed to construe such a requirement so strictly as to inhibit the transfer of stock for the express and avowed purpose of qualifying the transferee for election to the office of director or trustee, yet the rule is limited to a transfer in good faith and does not apply to render eligible one to whom stock is transferred solely for the purpose of qualifying him, the stock being immediately assigned back to the true owner in blank, though his name remains on the corporate books as a stockholder.⁶ It is quite common, therefore, for stock to be transferred to a person in order to qualify him as a director;⁷ and the mere fact that shares are so transferred does not tend to prove that the transferee is not a bona fide stockholder.⁸ Where stock is held by a director merely to qualify him, of which stock he is not the beneficial owner, upon receiving notice and demand to transfer the stock such a person ceases to be a stockholder in the company, so that his presence is not necessary to a meet-

3. Rozeerans Gold Min. Co. v. Morey, 111 Cal. 114, 43 Pac. 585.

4. Webster v. Bartlett Estate Co., 35 Cal. App. 283, 169 Pac. 702.

5. See *infra*, § 424.

6. Webster v. Bartlett Estate Co., 35 Cal. App. 283, 169 Pac. 702 (quoting from 7 Ruling Case Law, p. 413).

7. Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Webster v. Bartlett Estate Co., 35 Cal. App. 283, 169 Pac. 702.

8. Webster v. Bartlett Estate Co., 35 Cal. App. 283, 169 Pac. 702. See Wolf v. St. Louis etc. Water Co., 15 Cal. 319, as to trust character of the holding.

ing of stockholders in order to have all present, where all of the beneficial owners are present.*

§ 418. Directors Named in the Articles—Certificate Naming Directors.—The fact that section 305 of the Civil Code provides that the corporate powers are to be exercised by a board of directors “elected” from the stockholders does not prevent the exercise of such powers by the directors named in the articles of incorporation. The provisions of section 290 of the Civil Code that the articles must set forth the number of directors and the names and residences of those who are appointed for the first year, taken in connection with the provisions of section 302 of the same code that directors are to be elected annually, necessarily imply that, in the interim between the organization of the corporation and the first election of directors, the corporate powers and authority may be exercised by the directors named in the articles of incorporation.¹⁰ And the same rule applies to persons named as directors in articles of consolidation, which are but new articles of incorporation.¹¹ The directors named in the articles have power to organize and apply to the commissioner of corporations for a permit to issue the company’s securities.¹²

Certificate naming directors.—Before a license to do business can be issued by the secretary of state upon pay-

9. *Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177; *Guaranty Loan Co. v. Treadwell*, 35 Cal. App. Dec. 643, 200 Pac. 653. See *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122 (raising but not deciding the question as to whether the absence of a director holding stock merely to qualify him as such affected the validity of an action of the board at a meeting held without notice).

10. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889. See

City of Oakland v. Carpentier, 13 Cal. 540, holding, in the case of a municipal corporation, that a majority of the members elected to the board of trustees are as well empowered to act at the first meeting as at any subsequent meeting of the board.

11. *California etc. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 7 Pac. 123.

12. *Stats.* 1917, p. 673, § 25, as amended *Stats.* 1921, p. 1114. See *infra*, § 421.

ment of the annual license tax, a certificate of the secretary of the corporation must be filed with the secretary of state, setting forth the names and addresses of each and all of the acting directors and managers of the corporation at the time of paying the tax. Notices that such certificate is required and of penalties for failure to file it are provided for and a suspension or forfeiture as for nonpayment of the license tax itself is fixed for failure to file it.¹³

§ 419. Tenure of Office in General.—The code requires directors to be elected annually by the stockholders;¹⁴ consequently the term of office is one year,¹⁵ beginning immediately upon election.¹⁶ As a matter of law, directors once elected continue in office until they resign or until their successors have been elected and qualified.¹⁷ But the authority of a board of directors as between the individuals of the board and the corporation ceases upon the selection of a new board,¹⁸ by valid election, and any subsequent proceeding by the old board is a mere nullity.¹⁹ The tenure of office of officers other than directors may be fixed by the by-laws.²⁰

§ 420. Filling Vacancies in the Board.—Whenever a vacancy occurs in the office of director, unless the by-laws

13. Stats. 1917, p. 371, as amended by Stats. 1921, p. 1424, adding § 3a. See *infra*, § 640, as to forfeiture for noncompliance with license tax act. The secretary of state has announced that "because of inconsistencies in the law which make it impossible of enforcement," no corporation will be penalized for not filing a certificate giving names and addresses of directors and managers.

14. Civ. Code, §§ 302, and 303, subd. 4.

15. Humboldt Sav. etc. Soc. v. Wennerhold, 81 Cal. 528, 22 Pac.

920; Kinard v. Ward, 21 Cal. App. 92, 130 Pac. 1194.

16. Waterbury v. Temescal Water Co., 11 Cal. App. 632, 105 Pac. 940.

17. Kinard v. Ward, 21 Cal. App. 92, 130 Pac. 1194.

18. Potomac Oil Co. v. Dye, 14 Cal. App. 674, 113 Pac. 126, 130, holding that the old board could not accept the resignation of a secretary and appoint a new one.

19. Guaranty Loan Co. v. Treadwell, 35 Cal. App. Dec. 643, 200 Pac. 653.

20. Civ. Code, § 303, subd. 6.

otherwise provide, such vacancy must be filled by an appointee of the board.¹ But, of course, if the stockholders are assembled by unanimous consent, they may elect officers to fill all vacancies then existing.² The board of directors has power to accept the resignation of a director, and to elect his successor at the same meeting, but a director who has tendered his resignation to take effect upon acceptance does not cease to be a director until acceptance of his resignation, and may therefore participate in a meeting and fill out a quorum.³ Directors owe to their constituents, the stockholders, the duty of keeping the board full by promptly filling vacancies as they occur, and this for the reason that stockholders are entitled to the benefit of the experience and advice of all the members of a full board in the transaction of business.⁴

§ 421. Organization of the Board.—Immediately after their election, the directors must organize by the election of a president (who must be one of their number), a secretary and treasurer.⁵ It will be presumed, until the contrary is shown, that the organization of the board of directors took place at the time provided by law, that is, immediately after election by the stockholders.⁶ The organization of the board is not prevented by the fact that the corporation is not authorized to issue its stock. The Corporate Securities Act specifically provides that the directors or trustees named in the articles may, prior to the issue of any shares, organize by the election of a president, who must be one of their number, a secretary and a

1. Civ. Code, § 305. See *Braslan v. Superior Court*, 124 Cal. 123, 56 Pac. 792, as to appointment of directors to fill a vacancy under a statute relating to insolvency, and permitting the court to fill the vacancy.

2. Civ. Code, § 318.

3. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

4. *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563. See *infra*, § 438, as to effect of vacancy in board.

5. Civ. Code, § 308.

6. *Waterbury v. Temescal Water Co.*, 11 Cal. App. 632, 105 Pac. 940.

treasurer; and such directors, or a majority of them, or such president and secretary may, in the name of and in behalf of the corporation, present an application to the commissioner for a permit.⁷

§ 422. Number of Directors.—The statute creates the office of director,⁸ and provides that the number in corporations for profit, shall not be less than three.⁹ The provisions of section 305 of the Civil Code as to the number of directors adds nothing to the effect of section 290 requiring the articles to state the number of directors. All the provisions of the statute taken together mean that every corporation must have a fixed and definite number of directors, of whom a majority shall constitute a quorum for the transaction of business.¹⁰ The number, in excess of three, is entirely dependent on the will of the majority of the stockholders. They have full power to increase the number.¹¹

Prior to 1915, a corporation for profit was restricted by subdivision 5 of section 290 of the Civil Code in altering the number of its directors otherwise than through an amendment of its articles of incorporation, by a majority of the stockholders.¹² Under the present method, the change is accomplished by the vote or written assent of stockholders representing a majority of the subscribed capital stock, or if there be no capital stock, by a vote or written assent of a majority of the members.¹³ As in the case of filing the original articles of incorporation, by

7. Stats. 1917, p. 673, § 25, as amended by Stats. 1921, p. 1114.

8. See *supra*, § 415.

9. Civ. Code, § 290, subd. 5, and § 305.

10. *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563.

11. *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516.

12. *Bank of Los Banos v. Jordan*,

167 Cal. 327, 139 Pac. 691 (holding that "majority" in this connection means a majority in interest of the stockholders and not a majority in number only); *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516; *Humphry v. Buena Vista Water Co.*, 2 Cal. App. 540, 84 Pac. 296.

13. Civ. Code, § 361, as amended in 1921 (see Stats. 1921, p. 127).

amendment of section 361 of the Civil Code in 1921 the certificate as to a change of directors provided for in that section must be first filed with the secretary of state and certified copies with the county clerks, reversing the order of filing which obtained prior to the amendment.¹⁴ After a change in the number of directors, the articles may be amended to state the number as increased or diminished, but the number cannot be changed by amending the articles, as this is expressly forbidden.¹⁵

De Facto Officers.

§ 423. In General.—Persons who hold office as directors, or other officers, with the consent of the corporation, and under color of an election or appointment, are *de facto* officers, although their election or appointment may have been illegal.¹⁶ And with the participating stockholders, the corporation itself is estopped to deny the regularity of the election of its directors.¹⁷ But directors or other officers must hold office under some appearance or color of right.¹⁸

14. See *supra*, §§ 49, 50, as to present and former rules in respect to filings.

15. Civ. Code, § 362.

16. *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516; *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191. See *Dahl v. Palache*, 68 Cal. 248, 9 Pac. 94 (where it was held that the election of vestrymen by a religious corporation was void); and see *First African M. E. Zion Church v. Hillery*, 51 Cal. 155 (holding that persons claiming to be trustees but who are neither trustees *de facto* or *de jure* may be rightfully ejected from the church by the trustees *de facto*).

Where the records of the corporation show that persons were elected at a meeting of stockholders to

serve as directors, whether their election is regular or not, if they assume the trust, they become at least *de facto* directors; *Balfour Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891.

17. *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516 (holding that the principle that there cannot be a *de facto* officer unless there is a *de jure* office for him to hold is inapplicable to the case of a private corporation electing more than the proper number of directors under color of an increase in number); *Ellsworth v. National Home etc. Builders*, 33 Cal. App. 1, 164 Pac. 14 (election held outside the state of incorporation).

18. *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126 (not de-

One does not become a de facto director who never acts as a director, who never accepts the office, and never holds himself out as such in any way, even though he does not repudiate it until long after his election.¹⁹ While, strictly speaking, the books of the corporation furnish best evidence upon the question of who are the de jure directors, the testimony of individuals is sufficient to establish at least their de facto capacity as directors,²⁰ or other officers.¹

§ 424. Nonstockholders as Directors.—Under section 305 of the Civil Code one who is not a stockholder at the time of his election does not become a director de jure by being elected a director, and the invalidity is not cured by giving him a share of stock after the election; but such person may be a director de facto.² And although the issue of certain stock is illegal, a director who is such only by virtue of owning such illegal stock, while not a de jure director, is at least one de facto.³ It is the rule in California that a director who ceases to be a stockholder during the term for which he is chosen, by reason of the transfer of his stock, does not cease to be a director where he acts as such with the consent of the majority of the board of directors; he is a de facto director,⁴ until ousted in a direct proceeding.⁵

oiding whether an officer appointed by a de facto board of directors would be a de facto officer). See *Eel River Nav. Co. v. Struver*, 41 Cal. 616 (holding that service of process may be on a duly elected president who has ceased to act, since he is president de jure, or may be upon the president pro tem., who has been elected for but one meeting but who nevertheless is regarded by the stockholders as the president of the corporation).

19. *Rozecrans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585.

20. *Reed & Co. v. Harshall*, 12 Cal. App. 697, 108 Pac. 719.

1. *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22.

2. *Rozecrans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585.

3. *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1.

4. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15 (commenting also on the rule in other jurisdictions); *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *San Jose Savings Bank v. Sierra Lumber Co.*, 63 Cal. 179.

5. *Seal of Gold Min. Co. v. Slater*,

§ 425. Powers, Duties and Liabilities.—De facto directors are directors of the corporation;⁶ and when nominally elected and acting as such, a de facto board has the same powers as a de jure board,⁷ and may legally perform all acts which are within the scope of the business and functions of de jure directors.⁸ For example, a de facto board of directors may exercise the powers of a de jure board in the matter of levying assessments on the capital stock,⁹ and their right to do so cannot be collaterally attacked.¹⁰ Likewise, a de facto board may call a meeting of stockholders,¹¹ and a de facto officer may issue a certificate of stock without invalidating it or impairing the right of the stockholder to vote it.¹² Directors who hold over as de facto directors after the expiration of their term must perform the duties enjoined by law with the same fidelity as regularly elected officers, and they are likewise subject to the same statutory liability for any failure of duty occurring during the term for which they may be holding over.¹³ And as to criminal acts there is no difference in liability. Thus, a de facto officer is crim-

161 Cal. 621, 120 Pac. 15; *San Jose Savings Bank v. Sierra Lumber Co.*, 63 Cal. 179.

6. *Reed & Co. v. Harshall*, 12 Cal. App. 697, 108 Pac. 719 (holding that de facto directors may be properly substituted in a suit for the corporation upon its dissolution).

7. *San Joaquin Land & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

8. *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

9. *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1; *San Joaquin Land & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

10. *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 97 Pac. 1. But see *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376, where in an action to declare an election of a board void and illegal and that fact being established, it was held to follow that the acts by which an assessment was levied and the sale of stock attempted thereunder were all done without authority and void.

11. *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

12. *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

13. *Kinard v. Ward*, 21 Cal. App. 92, 130 Pac. 1194.

inally liable for embezzlement of funds in his hands equally with a de facto officer.¹⁴

§ 426. Validity of Acts of De Facto Officers.—So long as de facto directors hold their position unchallenged by any member of the corporation, their title to office cannot be impeached collaterally,¹⁵ and their acts, in so far as third persons acting in good faith are concerned, are valid and binding upon the corporation, as though they were officers de jure.¹⁶ Accordingly, acts of officers are not subject to collateral attack, by showing irregularity of their election,¹⁷ or appointment.¹⁸ Their authority can be questioned only in quo warranto proceeding or by the method provided in section 803 of the Code of Civil Procedure.¹⁹

While it has been said that the rule of law for the protection of third parties as to the acts of de facto officers

14. *People v. Leonard*, 106 Cal. 302, 39 Pac. 617.

15. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15; *Balfour-Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891; *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179.

16. *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516; *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15; *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *Balfour-Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891; *San Joaquin Land & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179. See *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 Pac. 86, and *Hoffman v. Guy M. Rush Co.*, 27 Cal. App. 167, 149 Pac. 177, to the effect that to bind the corporation it is not necessary to show a resolution passed

appointing general manager but only that he is a manager de facto.

17. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594; *Ellsworth v. National Home etc. Builders*, 33 Cal. App. 1, 164 Pac. 14; *Shively v. Eureka Tellurium etc. Min. Co.*, 5 Cal. App. 236, 89 Pac. 1073.

18. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594 (holding that a corporation will not be permitted, after allowing a person to act as its secretary and causing him to authenticate its records, to object to the regularity of his appointment or to repudiate an obligation signed by him as secretary under authority of its board of directors).

19. *Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177.

To hold otherwise would be to render insecure all the operations of corporations; *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

may well be doubted when applied between the corporation and its own illegally elected officers,²⁰ it has been held applicable in an action by an officer appointed by de facto directors where the corporation has received the benefit of services for which the officer seeks to recover.¹

§ 427. Mode of Trying Title to Office.—While, as a general rule, mandamus does not lie to try the title to an office,² nevertheless the same result is reached by mandamus to compel a person claiming to act as an officer of a corporation to deliver up its seal, books, papers and records.³ Thus, it has been held that the court may entertain an action by a foreign corporation against its officers, resident in California, of whom it cannot obtain jurisdiction in its own domicile, and that in California the remedy by mandamus is appropriate for the purpose of the proceeding, notwithstanding the title to the office may be incidentally involved.⁴ The remedy has also been invoked by domestic corporations against their officers to compel one claiming to be an officer of the corporation to deliver to the corporation or to its legally elected officer entitled to the custody thereof, the seal, books, records and other personal property of the corporation. And in such proceeding the legality of their elections have been determined.⁵ So far as directors are concerned, of course

20. *Rozecrans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585.

1. *Hygienic Health Food Co. v. Grant*, 36 Cal. App. Dec. 241, 202 Pac. 653, approved in 62 Cal. Dec. 581, 63 Cal. Dec. 189, 202 Pac. 653, holding the suggestion in *Rozecrans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585, inapplicable to the instant case.

2. See MANDAMUS.

3. *Potomac Oil Co. v. Dye*, 10 Cal. App. 534, 102 Pac. 677, per Taggart, J.

4. *Potomac Oil Co. v. Dye*, 14 Cal.

App. 674, 113 Pac. 126; *Potomac Oil Co. v. Dye*, 10 Cal. App. 534, 102 Pac. 677. See *Saline Valley Salt Co. v. White*, 177 Cal. 341, 170 Pac. 820, where remedy by mandamus was used to settle a controversy between rival sets of persons asserting, respectively, that they were the officers and directors of the corporation, and where mandamus as the proper remedy was not questioned.

5. *Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177; *Guaranty Loan Co. v. Treadwell*, 35 Cal. App. Dec. 643, 200 Pac. 653.

a suit may be brought under the code to determine the validity of their selection by the stockholders,⁶ but otherwise the authority of a de facto board cannot be questioned collaterally, and their right to the offices claimed and exercised by them can only be tested in a quo warranto proceeding, or by the method provided by section 803 of the Code of Civil Procedure.⁷

Meetings of Directors.

§ 428. **Notice in General.**—The law contemplates that all the directors shall have notice of every meeting. If a meeting is a regular one, the by-laws fix the time and place; if it is an adjourned meeting, the directors are presumed to know what they have done at a regular meeting; and if it is a special meeting, notice of time and place must be given.⁸ The general rule that all directors are entitled to notice of any meeting at which any corporate business is transacted yields, however, to the principle that failure to give notice is waived or rendered of no importance where, notwithstanding lack of notice, all directors meet, consult and participate in the business of the meeting, and to the further principle that where a meeting is regularly assembled and adjourns to a future time and place, special notice of the adjourned meeting is not necessary.⁹ Knowledge of all the directors as to time and place and fact of a proposed meeting derived from their order calling it is not sufficient to take the place of the notice, written or oral, which either the statute or by-laws require to be given.¹⁰ And in a case where a meeting has been regularly called and all the directors given notice, it has been

6. See *supra*, § 282.

7. *Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177.

8. *Baisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662. See *infra*, § 430, as to regular meetings; *infra*, § 431, as to special meet-

ings, and *infra*, § 433, as to adjourned meetings.

9. *Bank of National City v. Johnston*, 6 Cal. Unrep. 418, 60 Pac. 776.

10. *Beatty v. Rianda*, 34 Cal. App. 180, 167 Pac. 185.

held that the mere circumstance that one of them was told that another would not be present and believed that a quorum would not be present, is not enough to make it a fraud for a majority of the board, including the director who had stated he would be absent, to meet pursuant to the call and notice.¹¹

§ 429. Place of Meeting.—Section 319 of the Civil Code provides that the meetings of stockholders and directors of a corporation must be held at its office or principal place of business.¹² Although the meaning of the phrase “principal place of business” is not defined, apparently it is not used in a sense synonymous with that of “office.”¹³ The provision of the section is that the meeting must be held “at,” not “in,” the office. Thus, it has been held that where a majority of the directors attempt to assemble pursuant to a regular notice and find the door of the office of the corporation locked and therefore convene in the hall, just outside the door, since no other director could have been thereby deprived of the opportunity to attend had he so desired, and the place being in imme-

11. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

12. Compare Civ. Code, § 303, subd. 1, which provides that “a corporation may, by its by-laws, where no other provision is specially made, provide for: 1. The time, place, and manner of calling and conducting its meetings.” In this connection, it will be observed that although section 302 of the same code prescribes notice of election of directors to be given by publication, unless all the stockholders waive such notice in writing, it has been held that the code provision was subject to a by-law passed under section 303 permitting by-laws to prescribe the mode and manner of giving notice of annual meeting or

to dispense with notice thereof. (*Guaranty Loan Co. v. Fontanel*, 183 Cal. 1, 190 Pac. 177.) It would appear that section 319 of the Civil Code likewise contemplates a special provision in the by-laws with respect to the place of holding the meetings of stockholders and directors.

13. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15 (where the precise significance of the terms was regarded as unimportant). See *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594, where the question was raised, but not decided, as to whether director had power to act at any other place than at the principal place of business of the corporation.

diate proximity to the office and the only place available under the circumstances, the meeting was properly and regularly held. It was said that it cannot be, under any reasonable construction of the statute, that any person who happens to be in possession of the office of the corporation has the power, by excluding the directors and members, to absolutely prevent the holding of meetings.¹⁴

§ 430. Regular Meetings.—The by-laws may provide the time, place and manner of calling and conducting meetings and may dispense with notice of all regular meetings.¹⁵ Where the time for regular meeting is prescribed in the by-laws, there is no necessity of notifying directors of such time.¹⁶ But if the by-laws do not make provision for regular meetings, notice must be given.¹⁷ And where the by-laws name the day for regular meetings, but do not name the hour of the day, notice must be given.¹⁸ It is entirely permissible for directors to meet on the day fixed for a regular meeting, even though a holiday. There is nothing in the general law prohibiting such a meeting because the date falls upon a holiday. Consequently where the day fixed for regular meeting falls upon a holiday, the board is not warranted in meeting on the following day.¹⁹

14. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

15. Civ. Code, § 303, subd. 1.

16. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15, holding that even where the office of the corporation has been changed, it is not necessary to give notice of the time of meeting, but is sufficient if every director has notice of the place.

17. Civ. Code, § 320.

The code limits the power to fix the time or place of regular meetings without notice to the by-laws, and therefore regular meetings can-

not be dispensed with except in the by-laws. *De Moulin v. Magnesite Refractories Co.*, 32 Cal. App. Dec. 1043. And see decision in 61 Cal. Dec. 751, 199 Pac. 42, on hearing after judgment in the district court of appeal, in which the supreme court, assuming the meeting to have been properly constituted, held the action of the board of directors on the matter in dispute unavailing.

18. *Lowe v. Los Angeles etc. Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

19. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92 (holding that the case was not

§ 431. Notice of Special Meetings.—Notice of a special meeting of the board of directors need not specify the purpose or object of the meeting,²⁰ in the absence of charter or by-law limitations.¹

Where no provision is made in by-laws.—The code provides that when no provision is made in the by-laws for the mode of calling special meetings, they must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or if there be none, on the order of two directors.² The reason for this particularity is said to lie in the fact that each director is a personal trustee of those stockholders whose cumulative votes have selected him for that office, and as such he is entitled to be present at every special meeting of the board and to have the precise formula of the statute or by-laws followed in giving him notice thereof. And this particularity is emphasized by section 320a requiring the written consent of directors to be entered on the record

within section 11 of the Civil Code, providing that whenever an act of a secular nature is appointed by law or contract to be performed on a particular day, which falls upon a holiday, it might be performed on the next business day with the same effect as if performed upon the day appointed, since a by-law provision is neither a law nor a contract within meaning of the code section). But see *Saline Valley Salt Co. v. White*, 177 Cal. 341, 170 Pac. 820, holding that the rule stated in the text does not obtain where the stockholders contracted under the Arizona statute, which provides for a postponement to the next day where the time appointed falls on a holiday, such meeting being something "provided to be done" within the meaning of the Arizona code.

20. *Seal of Gold Min. Co. v.*

Slater, 161 Cal. 621, 120 Pac. 15; *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17; *Granger v. Original etc. Min. Co.*, 59 Cal. 678; *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91. See *supra*, § 428, as to notice of directors' meetings in general; and *supra*, § 275, as to stockholders' meetings.

1. *Bank of National City v. Johnston*, 6 Cal. Unrep. 418, 60 Pac. 776. The by-laws may, of course, provide the time, place and manner of calling and conducting meetings. Civ. Code, § 303.

2. Civ. Code, § 320.

The holding of special meetings is of such importance that it has been made the subject of express statutory provision. *Beatty v. Rianda*, 34 Cal. App. 180, 167 Pac. 185.

of the meeting if the requirements of the statute or by-laws have not been followed.³ It is the general rule, therefore, that a special meeting held without notice is void, and the directors present at such meeting cannot perform any valid corporate act.⁴ The provision that a majority of the whole number of trustees shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid, does not change the rule.⁵

Section 320 of the Civil Code does not prescribe any form of notice,⁶ and all that is required is a written notice sufficient to inform the directors that a special meeting is called and of the exact time and place where it is to be held.⁷

Length of notice.—The statute providing for the calling of special meetings makes no provision as to how long prior to a meeting notice thereof must be given.⁸ Provisions of the by-laws relating to notice should be construed with a view to preserving the reasons for exactness in the

3. Beatty v. Rianda, 34 Cal. App. 180, 167 Pac. 185.

4. Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; Relley v. Campbell, 134 Cal. 175, 66 Pac. 220; Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383; Curtin v. Salmon River etc. Ditch Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Thompson v. Williams, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; Harding v. Vandewater, 40 Cal. 77; Beatty v. Rianda, 34 Cal. App. 180, 167 Pac. 185.

5. Harding v. Vandewater, 40 Cal. 77 (under statutes of 1853, p. 281).

6. Bell v. Standard Quicksilver

Co., 146 Cal. 699, 81 Pac. 17. And see De Moulin v. Magnesite Refractories Co., 32 Cal. App. Dec. 1043 (rehearing in supreme court, 61 Cal. Dec. 751, 199 Pac. 42), to the effect that the by-laws cannot dispense with notice of special meetings.

7. Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 120 Pac. 15 (holding that a notice which contains these requirements is effective to confer upon the board jurisdiction to transact any business properly within the scope of its powers at the time of the meeting); Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17; Granger v. Original etc. Min. Co., 59 Cal. 678.

8. See Civ. Code, § 320. See infra, § 435, as to proof of service.

method of calling special meetings.⁹ Accordingly, provisions for notice of at least two days seem to be approved,¹⁰ and also provisions for notice of at least one day before the time of meeting.¹¹ Although it may be that insufficient notice is given to an absent director under a by-law requiring not less than one day's notice where the notice is mailed from one city to another the day before the date of the meeting, yet a showing must be made that such notice was mailed at the latest precisely on the day before the meeting in order to show insufficiency.¹²

§ 432. Who may Call.—Section 320 of the Civil Code places upon the president the duty to call special meetings of the directors, and so, while there is a president competent to act, individual directors have no authority to call the meeting.¹³ However, in the absence of the president, the vice-president authorized to take his place and perform his duties may call special meetings.¹⁴ The power given by statute to two of the directors to call special meetings is independent of that vested in the president or the person who may be acting as such in his absence.¹⁵ It has been held that the code will not bear the construction that it is the duty of the president to call a meeting whenever requested to do so by a director and

9. *Beatty v. Rianda*, 34 Cal. App. 180, 167 Pac. 185. See *supra*, this section, as to reasons for the code requirement.

10. *Stockton etc. Agr. Works v. Houser*, 109 Cal. 1, 41 Pac. 809 (where notices were mailed three days before day named for the meeting).

11. *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552. Where evidence was given that notice had been personally delivered at least twenty-four hours prior to the meeting, in the absence of any evidence

to the contrary, the court was held authorized to find that proper notice of the meeting was given; *Balfour-Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891 (where it did not appear whether by-laws had made provision or not).

12. *La Habra Oil Co. v. Francis*, 35 Cal. App. 168, 169 Pac. 401.

13. *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *Beatty v. Rianda*, 34 Cal. App. 180, 167 Pac. 185.

14. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17.

15. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17.

that his refusal under any circumstances to comply with the request makes it lawful for any two directors to make the call. The bare delegation of power to make the call implies that the exercise of the power shall be discretionary, and in the absence of abuse the discretion cannot be interfered with.¹⁶

§ 433. Adjourned Meetings.—If a quorum is present, a meeting may be adjourned to any day and hour, and such an adjourned regular meeting is a regular meeting and not a special one.¹⁷ And the board of directors at an adjourned meeting has power to transact any business which they might have transacted at the meeting adjourned,¹⁸ but business which was not and could not have been before the meeting which was adjourned cannot be lawfully transacted at the subsequent adjourned meeting, at least unless at the latter meeting all the directors are present.¹⁹ A director receiving notice of a meeting is bound to know that a quorum might adjourn, and that business might be transacted at the adjourned meeting. And this is in accord with the general rule that no notice of adjournment of a meeting regularly called need be given.²⁰ Where a

16. *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024.

17. *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 637, 95 Pac. 662. See *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92, where the question was raised as to whether even a quorum might make successive adjournments of a previous regular meeting so that the last adjournment would be to a date beyond that fixed for the next regular meeting of the board by the by-laws, but the question was not decided, since in the particular case a quorum was not present at the original meeting.

18. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

19. *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383, reversing the department decision in the same case, 6 Cal. Unrep. 413, 60 Pac. 776, on this point.

20. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15; *Whitcomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887 (in which also the only director absent at the first meeting was notified of the adjourned meeting). See *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383, as to an adjournment implying an agreement to meet on the day to which the adjournment was taken.

meeting is regularly assembled, but adjourns to a future time and place, the fact and record of the adjournment give notice of the adjourned meeting.¹ But where the exact time for the adjourned meeting is not fixed, notice must be given, for in such case an inspection of the minutes of the original meeting would not give information to directors not attending the meeting of the time to which it had been adjourned.²

Under the rule of the code that unless a quorum is present at a meeting and acting no business performed or act done is valid as against the corporation,³ less than a quorum of the board have no authority to adjourn a meeting to any date whatever,⁴ for the adjournment of such a meeting is "an act done," within the meaning of the code, and hence, is not a valid act where a quorum is not present.⁵

§ 434. Presumption of Regularity.—It has been said that the presumption *omnia rite acta* covers a multitude of defects in cases of giving of notice of directors' meetings,⁶

1. *Bank of National City v. Johnston*, 6 Cal. Unrep. 418, 60 Pac. 776.

2. *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153 (where the day, but not the hour was fixed).

3. Civ. Code, § 305. See *infra*, § 437.

4. *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92. If there be no quorum present, then there is no meeting in a legal sense to be adjourned; *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662.

5. *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662, where it is said: "It is significant in this connection that there is no provision of the code to which our attention has been called authorizing a

meeting of the directors of a corporation to be adjourned by a minority. In the very chapter in which it is provided that unless a quorum is present and acting no act done is valid as against the corporation, we find a provision that if, at a stockholders' meeting, there is not present a majority of the subscribed stock or of the members, the meeting may be adjourned from day to day or from time to time, such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors." (Citing Civ. Code, § 312.) See *supra*, § 284, as to adjournments of stockholders' meetings.

6. *Stockton etc. Agr. Works v. Houser*, 109 Cal. 1, 41 Pac. 809, quoting from *Sargent v. Webster*,

and throws the burden upon those who would deny the regularity of a meeting for want of due notice, to establish the irregularity by proof.⁷ It is not necessary that it appear by the records that all the directors were notified, and it is not usual in corporate records to state how members were notified.⁸ It is presumed, therefore, where the contrary does not appear, that proper notice has been given,⁹ even where the notice is not recited in the record of the meeting,¹⁰ or even where the resolution recites the absence of one of the directors.¹¹ And of course for a stronger reason, a record in the minutes that the meeting was called or that the directors were notified raises a presumption that due notice was given thereof.¹² Where it is not shown whether a meeting is regular or special, there is no presumption that it was a special meeting,¹³ but the

13 Met. (Mass.), 497, 46 Am. Dec. 743. See EVIDENCE as to the presumption of regularity generally.

7. Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Stockton etc. Agr. Works v. Houser, 109 Cal. 1, 41 Pac. 809; La Habra Oil Co. v. Francis, 35 Cal. App. 168, 169 Pac. 401; Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289. It is not incumbent upon the party relying upon the regularity of acts done at the meeting to show affirmatively that it was regularly called and noticed. Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289.

8. Stockton etc. Agr. Works v. Houser, 109 Cal. 1, 41 Pac. 809.

9. Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891; Granger v. Original etc. Min. Co., 59 Cal. 678; Whitcomb v. Gianini, 43 Cal. App. 229, 184 Pac. 887.

10. Stockton etc. Agr. Works v. Houser, 109 Cal. 1, 41 Pac. 809.

11. Mills v. Boyle Min. Co., 132 Cal. 95, 64 Pac. 122.

12. Robinson v. Blood, 151 Cal. 504, 91 Pac. 258; Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70.

Starting with this presumption of regularity of proceedings as shown in the minutes, the court may refuse to believe contrary testimony of directors in the face of their written certificate contradicting their testimony; Lowe v. Los Angeles etc. Gas Co., 24 Cal. App. 367, 141 Pac. 399, holding that a finding of fact that there were directors' meetings implies that a notice in writing had been given of such meetings.

A finding that the meeting was "duly and regularly convened" includes a finding that the necessary notice was given; Younglove v. Steinman, 80 Cal. 375, 22 Pac. 189.

13. Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

*presumption must be indulged that it was a lawful meeting of the board, whether regular or special.¹⁴

§ 435. **Duty of Secretary—Proof of Service.**—It is the duty of the secretary, where not otherwise provided in the by-laws,¹⁵ to give notice of meetings of directors. To give a written notice implies that the person charged with that duty shall by some means see to it that the necessary notice is delivered to the person who is to receive it. It is the equivalent of the service of papers and involves only a delivery of sufficient notice to the proper person. The code section does not require the notice to be signed by the secretary, consequently, when signed by an officer authorized to make it, and otherwise containing the essential requisites of a notice, it will answer all the purposes of a notice.¹⁶ A requirement that the notice must be "served" would seem to negative the inference that where the word "written" is not used a notice need not be written.¹⁷

Proof of service.—The testimony of the secretary that he had given notice to each of the directors by sending to them by messenger a written notice the requisite time prior to the meeting, in the absence of contrary evidence, has been held sufficient evidence upon which to base a finding that proper notice was given.¹⁸ A common provision of by-laws is that service of notice when entered in the minutes and read and approved at a subsequent meeting of the board shall be conclusive upon the question of service. But where the minutes contain no entry of the ser-

14. *Aetna Indemnity Co. v. Altadena Min. etc. Co.*, 11 Cal. App. 165, 104 Pac. 470.

15. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17; *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

16. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17.

17. *Beatty v. Rianda*, 34 Cal. App. 180, 167 Pac. 185 (not deciding, however, that verbal notice could not be provided).

18. *Balfour-Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 391.

vice and are never approved at a subsequent meeting, there can be no conclusive proof of service in this manner.¹⁹ Under such circumstances this method of proof is not exclusive and the court cannot refuse to permit proof of due service. Such provisions are intended to facilitate the proof of the regularity of the proceedings of the board, not to limit proof to the minute entries and clerical acts.²⁰

§ 436. Waiver of Notice of Meeting.—It is provided by the code that when all the directors of a corporation are present at any meeting, however called or noticed, and sign a written consent thereto, or if the majority of the directors are present, and those not present sign a written waiver of notice of such meeting, and such consent or waiver is made a part of its records, the transactions of the meeting are as valid as if had at one regularly called and noticed.¹ And so, the requirements of call and notice may be waived by the members of the board, either expressly or impliedly, by their presence and participation in the meeting.² Although the question as to waiver upon the minutes of the meeting has not been directly presented, there is dictum to the effect that the presence of all directors at an adjourned meeting will cure a defect as to notice.³ But it has been held that where all the directors

19. *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

20. *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289.

1. Civ. Code, § 320a.

2. *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289; *Bank of National City v. Johnston*, 6 Cal. Unrep. 418, 60 Pac. 776. See *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122, where the question was presented but not decided as to whether the absence of a director who held one share to qualify would

affect the validity of the action of the board, all other shares being held by the directors present. And see *Boggs v. Lakeport etc. Park Assn.*, 111 Cal. 354, 43 Pac. 1106. And see *Boggs v. Lakeport etc. Park Assn.*, 111 Cal. 354, 43 Pac. 1106, where it does not appear that the meetings had been regularly called, but where all members of the board were present.

3. *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; *Whitcomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887.

are not present at an adjourned meeting, business cannot be transacted which could not have been transacted at the meeting adjourned. Thus, since an order for the collection of an assessment by suit could not be made by the directors at a meeting held prior to the delinquency, they could not lawfully act to pass such resolution at an adjournment of such meeting where it does not appear that all of the directors were present at the adjourned meeting.⁴

Quorum.

§ 437. **In General.**—Powers given to boards of directors are usually exercised by a quorum, which, unless changed by statute or by-law, is a majority of the board.⁵ Unless a quorum is present and acting, no business performed or act done is valid as against the corporation.⁶ A majority of the directors, under the statute, is a sufficient number to form a board for the transaction of business, and every decision of a majority, made when duly assembled, is valid as a corporate act,⁷ even though the remaining directors do not attend under the belief that no quorum will be present.⁸ To pass a resolution ordinarily, it is essential that a majority only of the qualified quorum should vote for it.⁹ However, the statute may require unanimous concurrence. But where it does, the provision is satisfied by the adoption by the unanimous vote of all the directors present at the meeting, who must constitute a quorum of the board. Such a statute does not require the unanimous vote of all the directors, nor the unanimous vote of all the members of the board, but merely the unanimous vote of

4. *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383.

5. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748.

6. Civ. Code, § 305.

7. Civ. Code, § 308.

8. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

9. *Smith v. Los Angeles Immigration etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748; *Pennington v. George W. Pennington Sons*, 27 Cal. App. 57, 148 Pac. 947.

the board.¹⁰ A director whose resignation has not been accepted, where it was to take effect upon acceptance, may participate in a meeting and fill out a quorum;¹¹ but a director whose resignation has already been accepted is devoid of authority to form a component part of the board.¹²

§ 438. Legal Effect of Unfilled Vacancies.—Directors who violate their duty to keep the board full by promptly filling vacancies should not, as against the stockholders, be allowed to take any advantage of acts or resolutions passed when the full board is not in existence. But when the corporation deals with a stranger who, acting in good faith and in ignorance of the existence of a vacancy in the board, parts with his property on the faith of what he is induced to believe is a valid corporate obligation, the case is different, and the votes of a majority of a full board may authorize a corporate act, although there may be a vacancy in the board.¹³ Admittedly, if there is no vacancy on the board and after due notice of the meeting one of the directors fails to attend, a resolution may be legally adopted by a majority vote of the qualified quorum of directors present. The generally accepted rule in the event of unfilled vacancies in boards of directors is that a quorum is a majority of the entire board as it would be constituted if all the vacancies were filled, and not a majority of the board as it remains with the vacancies unfilled. In other words, the power of the board to transact business is neither diminished nor defeated by the fact of a vacancy in the board, unless the number of statutory directors be reduced below the required quorum, and the number of directors required to be present in order to

10. *Tidewater Southern Ry. Co. v. Jordan*, 163 Cal. 105, Ann. Cas. 1913E, 1293, 41 L. R. A. (N. S.) 130, 124 Pac. 716.

11. *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

12. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

13. *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563.

constitute a quorum for the transaction of business remains the same, even though there be unfilled vacancies in the board.¹⁴ It has been said that the rule requiring such number to constitute a quorum is subject to an exception for the purpose of filling vacancies in the board.¹⁵

§ 439. Interested Director as Part of Quorum.—A board is not competent to transact corporate business, where there is not a majority of the directors, exclusive of interested directors, present and acting. Section 305 of the Civil Code defining a quorum and the validity of the acts of the board, and section 308, providing that a majority of the directors may act, are both limited by the principle that a director shall not participate in any act in which his personal interest is antagonistic to that of the corporation. For the purpose of any action in such case, the director is as much a stranger to the board as if he had never been elected a director, and this is true although he may be physically present in the room with the other directors.¹⁶ Consequently, where a bare majority or quorum is present, one or more of whom are interested in the transaction passed on, the transaction cannot be authorized,¹⁷ and in such case it is void, not merely voidable.¹⁸

14. *Pennington v. George W. Pennington Sons*, 27 Cal. App. 57, 148 Pac. 947.

15. *Brown v. Valley View Min. Co.*, 127 Cal. 630, 60 Pac. 424.

16. *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552. See *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082, where this is assumed to be the established rule.

17. *De Moulin v. Magnesite Ref. Co.*, 61 Cal. Dec. 751, 199 Pac. 42; *Curtin v. Salmon River etc. Ditch*

Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Smith v. Los Angeles Immigration etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Lowe v. Los Angeles etc. Gas Co.*, 24 Cal. App. 367, 141 Pac. 399; *In re McCarthy Portable Elevator Co.*, 201 Fed. 923, 120 C. C. A. 261, S. C., 196 Fed. 247. See *infra*, § 448, as to voting by interested directors.

18. *In re McCarthy Portable Elevator Co.*, 201 Fed. 923, 120 C. C. A. 261, S. C., 196 Fed. 247 (construing the laws of California).

Management of Corporate Affairs by Directors.

§ 440. **In General.**—It is provided by the code that the corporate powers and business of all corporations formed under the laws of the state of California must be exercised and conducted and the property of such corporations controlled by a board of not less than three directors.¹⁹ The directors of a corporation are its chosen representatives and constitute, for all purposes of dealing with others, the corporation itself. Even the motives and intentions of the directors, when a material fact in issue, may be imputed to the corporation.²⁰ The power to perform corporate acts is in the board of directors,¹ to be exercised when the majority are duly assembled as a board,² and subject in certain instances under the statute, to the consent of the stockholders,³ or, in certain other instances, to authoriza-

19. Civ. Code, § 305.

20. *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672 (holding a corporation for libel involving a malicious intent); *Lowe v. Yolo County etc. Water Co.*, 157 Cal. 503, 108 Pac. 297 (quoting *Maynard v. Fireman's Fund Ins. Co.*, supra, with approval). But see opinion of McKinsty, J., in *Low v. California Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629, dissenting from the statement that, under our system, the directors of a corporation are the corporation, and stating that "the directors are trustees, clothed with limited powers, to be exercised for the benefit of the stockholders, and that they act for and on behalf of the stockholders, and the relation between them—at least in equity—is that of the agent and principal."

1. *Estate of Friedman*, 171 Cal. 431, 153 Pac. 918; *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373; *In re Solidarite etc. Ben. Assn.*, 68 Cal. 392, 9 Pac.

453; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Harvey v. Meigs*, 17 Cal. App. 353, 119 Pac. 941; *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981. See *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855, comparing the power of a corporation to enter into a general partnership with another corporation with powers incident to a partnership. See *infra*, § 670, as to appointment of receivers as displacing the corporate management.

2. See § 443, *infra*.

3. *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552, stating that under such statutes the consent of the stockholders is a component part of the power.

It has been held that there may be some doubt as to the validity of a by-law as in conflict with section 305, where it requires the consent of stockholders to lease or mortgage corporate property, in the absence

tion of the transaction by the court.⁴ Directors are made by law the managing agents or governing body to control the business affairs of the corporation;⁵ and authority to perform acts within the managing power must come from them.⁶ Therefore, the power to perform corporate acts is not vested in the president,⁷ nor in the secretary,⁸ nor in the president and secretary together,⁹ nor in a single director or officer;¹⁰ and the stockholders have no authority, individually or collectively, to perform corporate acts.¹¹

§ 441. Knowledge of Corporate Business—Dealings With Others Than Directors.—Since the business of a corporation can be transacted only through the directors,¹²

of statute; *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15. See *supra*, § 250 et seq., as to ratification of real property transactions.

4. See Civ. Code, § 598, relating to sales of real property by religious corporations as an example of statutes requiring authorization of corporate acts by the court. See *RELIGIOUS SOCIETIES*.

5. *Escondido Oil etc. Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040; *Veroutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375; *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779; *Mulligan v. Smith*, 59 Cal. 206; *Moyle v. Landers*, 3 Cal. Unrep. 113, 21 Pac. 1133; *Western Nat. Bank v. Wittman*, 31 Cal. App. 615, 161 Pac. 137; *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130. See note, 5 A. L. R. 932, as to power of directors to sell property of insolvent corporation without consent of stockholders.

6. *Mulligan v. Smith*, 59 Cal. 206; *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 123 Pac. 212. And see cases cited *supra*.

7. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac.

373; *Bliss v. Kawea etc. I. Co.*, 65 Cal. 502, 4 Pac. 507; *Farmers' Loan & T. Co. v. San Diego Street Car Co.*, 45 Fed. 518, to the effect that neither the president nor any other officer has power to mortgage or dispose of all the corporate property, quoting sections 305 and 308 of the Civil Code.

8. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373; *Blood v. Marcuse*, 38 Cal. 590, 99 Am. Dec. 435.

9. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373.

10. *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, 4 Pac. 106; *In re American Guarantee etc. Co.*, 192 Fed. 405 (to the effect that the statutes of California confer no authority on any individual officer to commit an act of bankruptcy, citing sections 305 and 308 of the Civil Code).

11. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

12. See *supra*, § 440.

one dealing with an officer acts at his peril without evidence that he is authorized to represent the corporation by its governing board.¹³ It has always been presumed that directors have knowledge of the business of corporations which it is their duty to manage and control.¹⁴ And so, the existence of authority in subordinate officers may be established by proof of the course of business and by the usages and practices of the company, and by the knowledge which the board has or must be presumed to have of the acts and doings of its subordinates in and about the affairs of the corporation.¹⁵ Knowledge of a general custom of business will be imputed to directors in passing a resolution, and the resolution will be construed as authorizing the transaction in accordance with such custom, for if the corporation does not desire the usual custom to be followed, it is incumbent upon it to so specify its desire in the resolution.¹⁶ Knowledge and intent cannot be imputed to a person however, merely because he is a director and officer. Directors are justified in relying upon subordinates and employees for data upon which to base their corporate action and are justified, in the absence of anything constituting gross negligence, in accepting and acting upon their reports.¹⁷

13. *State Savings etc. Bank v. Winchester*, 25 Cal. App. 691, 145 Pac. 171.

14. *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844 (denial on information and belief is not good as to things presumably within the knowledge of directors); *Southern California Home Builders v. Young*, 31 Cal. App. Dec. 336, 188 Pac. 586; *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 Pac. 80; *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 123 Pac. 212. See *McClendon v. Heisinger*, 42 Cal. App. 780, 184 Pac. 52, and *Keiser*

v. Butte Creek Consol. Dredging Co., 32 Cal. App. Dec. 431, 191 Pac. 552, holding that a director's acts and his knowledge as a director does not necessarily affect his private dealings.

15. *Mahoney Min. Co. v. Anglo California Bank*, 104 U. S. 192, 26 L. Ed. 707, see, also, *Rose's U. S. Notes* (case arising in California).

16. *Henderson v. Western Gas Engine Co.*, 8 Cal. App. 247, 96 Pac. 787.

17. *Nash v. Rosesteel*, 7 Cal. App. 504, 94 Pac. 850, holding representations made as not being fraudulent where based upon such data.

§ 442. **Delegation of Corporate Power by Directors.**—Under the California law, the power, at their discretion, to purchase and sell real property cannot be conferred upon agents other than the directors themselves;¹⁸ and as long as the corporation exists, its affairs must be managed by its duly elected officers as provided by law.¹⁹ Thus, however broad may be the terms of a contract of employment with a general managing agent, they cannot be broad enough to divest the board of directors of the authority imposed by law to manage and control the affairs of the corporation.²⁰ But agreements may confer very broad powers and nevertheless be valid. Thus, where each of two corporations appointed a trustee, and these were given control of certain of the properties of the corporations, to operate and control for the use and benefit of the corporations, the contract was held not to be ultra vires. A contract which does not take from the board of directors the management of the corporate affairs and transfer it to the trustees may be valid for the further reason that the powers given thereunder are limited in scope and executory in nature and such as could not have been discharged by any board of directors otherwise than through an agent.¹ And it has been held that the appoint-

18. *Bliss v. Kaweah etc. Irr. Co.*, 65 Cal. 502, 4 Pac. 507. See *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91, where it was contended that a resolution, authorizing the president and secretary to enter into contracts for the sale of property embracing all the assets of the corporation and bestowing on them the discretion of fixing the terms and conditions thereof, was void as delegating the exercise of fundamental and basic powers outside of the ordinary business of the corporation and as involving the employment of discretion, but where it appeared the con-

tract was signed by the president and secretary at a directors' meeting and thereby ratified.

19. *Merrill Lodge v. Ellsworth*, 78 Cal. 166, 2 L. R. A. 841, 20 Pac. 399, 400. See *supra*, §§ 440, 441.

20. *Oliphant v. Home Builders*, 34 Cal. App. 720, 168 Pac. 700, where the general manager was employed "to manage, take charge of and conduct the business of the corporation along such lines as he may deem expedient and best."

1. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495.

ment by several corporations of an executive committee for the purpose of exclusively representing the parties in certain negotiations as to the regulation of conditions of employment is not a delegation of the discretionary functions of the directors of such corporations, and a contract having that object in view is not beyond the powers of the corporations party thereto.²

The purpose of a grant of corporate power is that the corporation shall exercise its power and carry on its business through its own officers and agents and not through officers and agents selected by another corporation, and that it shall maintain an independent corporate existence and not surrender the control of its affairs or the exercise of its powers to another corporation. Consequently, provisions that another corporation shall select certain directors and that all members of the board shall be acceptable to such other corporation are ultra vires and contrary to the laws of California.³

§ 443. Action of Directors Assembled as a Board.—It is a general rule that no decision or act is a valid corporate act if made or done by any number of the directors while not duly assembled as a board for the purpose of transacting corporate business.⁴ The powers vested in

2. *Dyer Bros. etc. Iron Works v. Central Iron Works*, 182 Cal. 588, 189 Pac. 445.

3. *Holt v. California Dev. Co.*, 161 Fed. 3, 88 C. C. A. 167, per Morrow, J.

4. *Lemoore etc. Irr. Co. v. McKenna*, 163 Cal. 736, 127 Pac. 345; *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373; *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607 (although all directors are present at a stock-

holders' meeting and assent to a resolution, they are acting as a board of directors, and they cannot authorize a corporate act unless acting as a board); *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731.

See *Crowley v. Genesee Min. Co.*, 55 Cal. 273, apparently contra, where it is said that the authority of an agent to contract "may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts." Although this case has often

the directors can be exercised by them only in their collective capacity, or by such agents, real or ostensible, as they have accredited or by their conduct are deemed to have accredited.⁵ An instrument signed by individual directors, therefore, is not valid in the absence of proof that a resolution of the board was passed or other appropriate action taken.⁶ The question as to when the directors shall be considered as duly assembled is not settled by the statute,⁷ except that it requires the presence of a quorum,⁸ at a regularly called meeting.⁹ Thus, where it does not appear that a meeting is a regular one or a special meeting noticed as required by law, the directors present cannot bind the corporation, as they are not duly assembled.¹⁰ A corporate act is usually accomplished by vote or resolution of the board.¹¹ The record of the vote or resolution, however, need not necessarily be spread upon the minutes, if actually passed, for a record of corporate acts and resolutions is not essential to their validity.¹²

been cited to support the contention that it is not necessary for the directors to meet as a board, the case was really decided upon the doctrine of ostensible authority of agents, or ratification implied by acquiescence. See, also, next statement in the text and citations thereto.

5. *Thomasson v. Grace Methodist Episcopal Church*, 113 Cal. 558, 45 Pac. 838; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817 (where the case was clearly one of ratification by failure to repudiate the acts of the secretary in employing a physician to care for an injured employee).

6. *Barnard v. McIntire*, 31 Cal. App. Dec. 51, 187 Pac. 440. See *Love v. Sierra Nevada etc. Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602 where directors individually signed a

mortgage, and it was held that since it was not by the corporation by its directors, it was not the legal mortgage of the corporation, although the defective execution might be remedied in equity.

7. *Harding v. Vandewater*, 40 Cal. 77.

8. See *supra*, § 437, as to a quorum.

9. See *supra*, § 428 et seq., as to meetings.

10. *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731.

11. *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731, holding that a mere conversation of the members of the board cannot serve as a resolution or vote.

12. See *supra*, § 130.

Fiduciary Relationship.

§ 444. **In General.**—Directors occupy a fiduciary relation to the corporation and its stockholders,¹³ and indirectly to the creditors.¹⁴ It is their duty to promote the interests of the stockholders and the corporation.¹⁵ Having been intrusted with the management of the corporate property for the common benefit and advantage of the stockholders, directors, by their acceptance of office, preclude themselves from doing any act or engaging in any transaction in which their private interest conflicts with the duty they owe to the stockholders,¹⁶ and from making any use of their power or of the corporate property to secure to themselves an advantage not common to all stockholders.¹⁷ The provisions of the Civil Code relating to agents and

13. *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N.S.) 1112, 129 Pac. 781; *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204; *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 63 Pac. 1011; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Shakespeare v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327, 20 Pac. 294; *Farmers' etc. Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62; *San Diego v. San Diego etc. R. Co.*, 44 Cal. 106; *Highland Park Inv. Co. v. List*, 42 Cal. App. 752, 184 Pac. 48; *Palo Alto etc. Loan Assn. v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124; *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976; *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162; *Bacon v. Soule*, 19 Cal. App.

428, 126 Pac. 384; *Aetna Indemnity Co. v. Altadena Min. etc. Co.*, 11 Cal. App. 165, 104 Pac. 470.

14. *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169; *Farmers' Loan & T. Co. v. San Diego etc. Car Co.*, 45 Fed. 518.

15. *San Diego v. San Diego etc. R. Co.*, 44 Cal. 106.

16. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

17. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Farmers etc. Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62; *Highland Park Inv. Co. v. List*, 42 Cal. App. 752, 184 Pac. 48; *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976; Civ. Code, § 2231; and generally, see TRUSTS.

For a director to acquire such an advantage is a constructive fraud against the beneficiaries of the trust; *Dundon v. McDonald*, 146 Cal. 585, 80 Pac. 1034; *Phillips v. San-ger Lumber Co.*, 130 Cal. 431, 62

trustees¹⁸ expressly apply to the directors of corporations in their relations as trustees of the stockholders.¹⁹ Like any other trustee, a director is bound to act in the utmost good faith toward his beneficiary.²⁰ For a violation of his duty in this respect, he is subject to removal.¹

§ 445. Relation to Stockholders in Private Dealings.—

The doctrine that officers and directors are trustees of the stockholders applies only in respect to their acts relating to the property or business or management of the corporation, and does not extend to their private dealings with stockholders or others,² though in such dealings they take advantage of knowledge gained through their official positions.³ Thus, directors as stockholders have a perfect right to dispose of their stock without regard to the wishes or knowledge of minority stockholders.⁴ Likewise, there is nothing in the relation which makes it a breach of trust for a director to purchase the stock of a stockholder at a delinquent assessment sale.⁵ So directors and officers have the right to purchase stock of other

Pac. 749; *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135; Civ. Code, § 2234.

18. See Civ. Code, § 2228 et seq., as to trustees; and see the article TRUSTS. See Civ. Code, § 2295 et seq., as to agents; and see AGENCY, vol. 1, p. 788, as to fiduciary relation between agent and principal.

19. *Snediker v. Ayers*, 146 Cal. 407, 80-Pac. 511; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 22 Pac. 665; *Palo Alto etc. Loan Assn. v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124; *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162; *Farmers' Loan & T. Co. v. San Diego etc. Car Co.*, 45 Fed. 518.

20. *Title Ins. & Trust Co. v. Cali-*

fornia Dev. Co., 171 Cal. 173, 152 Pac. 542; *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135; *Aetna Indemnity Co. v. Altadena Min. etc. Co.*, 11 Cal. App. 165, 104 Pac. 470.

1. See *supra*, § 285.

2. *Ryder v. Bamberger*, 172 Cal. 791, 158 Pac. 753; *McCord v. Martin*, 32 Cal. App. Dec. 404, 191 Pac. 89; *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384.

3. *Ryder v. Bamberger*, 172 Cal. 791, 158 Pac. 753; *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384.

4. *Ryder v. Bamberger*, 172 Cal. 791, 158 Pac. 753.

5. *Whitcomb v. Giannini*, 43 Cal. App. 229, 184 Pac. 887.

stockholders where the transaction is free from fraud, and they are not bound to acquaint the sellers with facts which would enhance the price of the stock,⁶ for in negotiating for the sale of stock, one director owes no special duty of a fiduciary nature.⁷ Manifestly, there is even less reason for holding that the secretary, who is a mere ministerial officer, is bound to disclose information he has received in his individual capacity as stockholder.⁸

§ 446. Inducements for Act or Vote.—It is a violation of a director's duty and of the trust reposed in him, for him to be "bought out of office." Directors may resign when they please, but they must not make a profit or benefit to themselves in the matter of such resignation, and if the consideration of an agreement be in whole or in part that a trustee shall resign his trust, it is illegal as *contra bonos mores*.⁹ Likewise, a director cannot obligate himself to vote in a certain way, and this being so, courts are powerless to direct his vote; hence an agreement that one shall be elected president is not capable of enforcement.¹⁰ But it has been held that a finding that a director voted for a resolution, and that his vote was afterwards surrendered to him without consideration, is not a finding that the two transactions were connected or that his action as director was induced by an agreement to surrender the vote.¹¹

6. *Byder v. Bamberger*, 172 Cal. 791, 158 Pac. 753; *McCord v. Martin*, 32 Cal. App. Dec. 404, 191 Pac. 89.

7. *Hallidie v. First Federal Trust Co.*, 177 Cal. 600, 171 Pac. 431, holding that the fact that the stock is worth very much more than the price paid does not furnish ground for setting the transaction aside; *McCord v. Martin*, 32 Cal. App. Dec. 404, 191 Pac. 89.

8. *McCord v. Martin*, 32 Cal. App. Dec. 404, 191 Pac. 89. See *McCord v. Martin*, 34 Cal. App. 129 (stock sale), and see *infra*, §§ 476, 477.

9. *Forbes v. McDonald*, 54 Cal. 98.

10. *Dulin v. Pacific Wood etc. Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

11. *Hudepohl v. Liberty Hill Con. Min. & Water Co.*, 80 Cal. 553, 22 Pac. 339.

§ 447. **Adverse Interests in General.**—A director, being a trustee, may not lawfully take part in any transaction in which he or anyone for whom he acts has an interest, present or contingent, adverse to that of his beneficiary,¹² for it is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee.¹³ This doctrine applies to all persons who occupy a fiduciary relation, but is especially applicable to officers of a corporation when acting for and in behalf of the company.¹⁴ However, an officer is not precluded from dealing directly with the corporation of which he is a director, although any transaction between them is subject to rigid scrutiny and is voidable for any violation of his duty as trustee, but is not ipso facto void.¹⁵ The burden is generally cast upon the trustee in such a case to make a clear showing

12. *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 63 Pac. 1011 (stating that this rule did not have its origin with the codes, but is much older); *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Shakespear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327, 20 Pac. 294; *Highland Park Inv. Co. v. List*, 42 Cal. App. 752, 184 Pac. 48. See Civ. Code, § 2230. And see TRUSTS.

13. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Davis v. Rock Creek etc. Min. Co.*, 55 Cal. 359, 36 Am. Rep. 40; *San Diego v. San*

Diego etc. R. Co., 44 Cal. 106. See TRUSTS.

14. See *infra*, § 451, as to transactions where the director attempts to represent both sides.

15. *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511; *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 73 Pac. 745 (sale of property to corporation as trustees under trust deed); *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024; *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162; *Lackenbach v. Finn*, 26 Cal. App. 482, 147 Pac. 471; *Aetna Indemnity Co. v. Altadena Min. etc. Co.*, 11 Cal. App. 165, 104 Pac. 470; *Shively v. Eureka etc. Min. Co.*, 5 Cal. App. 236, 89 Pac. 1073.

of the absence of fraud and that there was no lack of good faith.¹⁶

§ 448. Vote of Interested Director.—The vote of a director who is personally and directly interested in the transaction before the board is a nullity,¹⁷ since he is disqualified as a matter of law from voting upon it.¹⁸ Where, however, a resolution is passed by the vote of a majority of a full board exclusive of the interested director, this is sufficient to bind the corporation.¹⁹ Although the interested director is present and participates, his vote, while expressing his assent to the arrangement and binding him so far,²⁰ has no effect in invalidating a resolution good without it.¹ But an interested director cannot be one of the majority essential to the adoption of the resolution.² Where directors are similarly interested in

16. *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162. See TRUSTS.

17. *Lower Kings River Reclamation Dist. No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887; *Chamberlain v. Pacific Wool-Growing Co.*, 54 Cal. 103.

18. *Pennington v. George W. Pennington Sons*, 27 Cal. App. 57, 148 Pac. 947.

19. *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511; *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563; *Smith v. Los Angeles Immigration etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677 (the majority of the quorum should vote for it; but the vote of the interested director cannot be counted); *Shakespear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327, 20 Pac. 294; *San Diego v. San Diego etc. R. Co.*, 44 Cal. 106; *Aetna Indemnity Co. v.*

Altadena Min. etc. Co., 11 Cal. App. 165, 104 Pac. 470.

20. *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563.

1. *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511; *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Porter v. Lassen County Land etc. Co.*, 127 Cal. 261, 59 Pac. 563.

2. *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Wickersham v. Crittenden*, 110 Cal. 332, 42 Pac. 893; *Wickersham v. Crittenden*, 106 Cal. 327, 39 Pac. 602; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Smith v. Los Angeles Immigration etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Shakespear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327, 20 Pac. 294; *San Diego v. San Diego etc. R. Co.*, 44 Cal. 106; *California etc. Land Co. v. Cuddeback*, 27 Cal.

several properties involved in a proposed corporate transaction, they are each disqualified from acting with reference to the acquirement of any of the properties;³ and where there are similar interests, they are disqualified to vote to one another salaries,⁴ or other allowances.⁵ It has been held that a director who is the wife of an interested party is not so directly and beneficially interested as to be disqualified from voting.⁶

§ 449. Interlocking Directorates.—Under the rule that the agents of two different parties may deal with one another,⁷ two corporations have the right to make contracts with each other, even though they have certain directors in common,⁸ or a majority of the directors in common,⁹ or all directors in common.¹⁰ There is no presumption of

App. 450, 150 Pac. 379. See *supra*, § 439, as to interested directors as part of a quorum. And see *infra*, § 456, as to the right to avoid the transaction.

3. Reclamation Dist. No. 70 v. Birks, 159 Cal. 233, 113 Pac. 170; Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887; Reclamation Dist. No. 542 v. Turner, 104 Cal. 334, 37 Pac. 1038.

4. *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 22 Pac. 665; *Shattuck v. Oakland etc. R. Co.*, 58 Cal. 550. See *Strouse v. Sylvester*, 6 Cal. Unrep. 798, 66 Pac. 660, where fraud was the basis of relief, the matter of voting by interested directors not being considered. And see cases cited *infra*, § 460, as to rule that directors cannot allow salaries to themselves where not authorized by the by-laws.

5. *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 22 Pac. 665 (holding the transaction to be voidable).

6. *Cuneo v. Giannini*, 40 Cal. App. 348, 180 Pac. 633.

7. *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29. See AGENCY, vol. 1, p. 793.

8. *San Diego etc. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29 (the question is not one as to authority, but whether the relations of the parties have been abused to the serious injury of one of the corporations). See *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749 (president common to both corporations).

For the federal statute forbidding interlocking directors in certain cases, see 9 Fed. Stats. Ann., 2d ed., p. 739.

9. *Manning v. App Consol. Gold Min. Co.*, 171 Cal. 610, 154 Pac. 301; *San Diego etc. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333.

10. *Manning v. App Consol. Gold Min. Co.*, 171 Cal. 610, 154 Pac. 301;

unfairness or illegality merely because two corporations which have certain directors in common deal with each other;¹¹ and the directors who are common to both companies are not within the rigid rule that one who acts in a fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void without any examination into its fairness or the benefits to the cestui que trust derived from it.¹² The rule, on the contrary, is that where one corporation deals with another and the same persons constitute all or a majority of the directorate of each company, there being no actual or intended fraud, the transaction is not void, but voidable only,¹³ and may be ratified by either party by conduct having that legal effect.¹⁴ Of course, such transactions may be avoided for fraud,¹⁵ by either company or at the instance of a stockholder in either company without regard to the question of advantage or detriment.¹⁶

§ 450. Dealing With Corporate Property.—The general rule is that a director or other officer in a position of trust

Smith v. Ferries etc. R. Co., 5 Cal. Unrep. 889, 51 Pac. 710.

11. Manning v. App Consol. Gold Min. Co., 171 Cal. 610, 154 Pac. 301 (holding that the fact that directors were all or most of them common to both corporations is not conclusive as to bad faith in transactions between them); San Diego etc. R. Co. v. Pacific Beach Co., 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333; Reclamation Dist. No. 70 v. Birks, 159 Cal. 233, 113 Pac. 170.

12. San Diego etc. R. Co. v. Pacific Beach Co., 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333.

13. Manning v. App Consolidated G. Min. Co., 171 Cal. 610, 154 Pac. 301; Sausalito etc. Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 Pac. 57; Smith v. Ferries etc. R. Co., 5 Cal. Unrep. 889, 51 Pac. 710.

14. Manning v. App Consol. G. Min. Co., 171 Cal. 610, 154 Pac. 301 (defense of suit on the liability of another corporation assumed by the corporation is a ratification of the transfer); Sausalito etc. Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 Pac. 57 (holding that knowledge of facts on which the right rested and delay in taking steps to avoid until after the expiration of a period equal or exceeding the period of the statute of limitations raises presumption of ratification).

15. San Diego etc. R. Co. v. Pacific Beach Co., 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333.

16. Sausalito etc. Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 Pac. 57.

may not use or deal in any manner with the property of the corporation for his own profit or for a purpose unconnected with his trust.¹⁷ For the officer of a corporation, while acting as trustee and agent to procure its property is a constructive or quasi fraud.¹⁸ A trust, either resulting or constructive, arises in favor of the corporation as against an officer as to anything that he might receive by a transfer or sale of the corporate property.¹⁹ The right to avoid a secret sale of corporate property by an officer to himself does not, as an abstract proposition, depend upon the adequacy of price.²⁰ And where an officer secures an adverse interest in corporate property, he must give immediate information thereof.¹ But a sale of property of a corporation by an officer to himself is merely voidable,² and until avoided the title remains in the officer.³ No principle of law or equity is violated by permitting a judgment creditor, even though he be a director of the debtor corporation, to become the purchaser at execution sale of the corporate property.⁴ Such a case is distinguishable from those cases where a director with no personal interest in the action becomes the purchaser under execution sale in a suit of a third party against the corporation,⁵ or where an officer secretly purchases corpo-

17. *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 63 Pac. 1011; *Lower Kings River Reclamation Dist. No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887. Civ. Code, § 2229. And see cases cited *infra*.

An officer can have no authority to use the corporate property for his own benefit and such use is notice of lack of authority; *Palo Alto etc. Loan Assn. v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124.

18. *Dundon v. McDonald*, 146 Cal. 585, 80 Pac. 1034.

19. *Lezinsky v. Mason Malt Whisky Distilling Co.*, 61 Cal. Dec. 329, 196 Pac. 884. See TRUSTS.

20. *Dundon v. McDonald*, 137 Cal. 1, 69 Pac. 498.

1. *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135.

2. *Smith v. Pacific Bank*, 137 Cal. 363, 70 Pac. 184. See *infra*, § 456, as to right to avoid the transaction.

3. *Smith v. Pacific Bank*, 137 Cal. 363, 70 Pac. 184; *Dyer v. Sebrell*, 135 Cal. 597, 67 Pac. 1036 (negotiable paper).

4. *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511.

5. *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511. See *Morton Gas Engine Co. v. California Seeded Raisin Co.*, 24 Cal. App. 362, 141 Pac. 392,

rate property at such sale or where he is permitted to purchase it under the belief on the part of other directors that he had purchased on behalf of the corporation.*

§ 451. Representatives of Corporation Dealing With Himself.—An express contract entered into by a director with himself relative to the corporate property is not binding upon the corporation.⁷ No inquiry into the question of the fairness or unfairness of such transaction is permitted, but it will be set aside at the mere option of the cestui que trust.⁸ The inquiry is stopped when the relation is disclosed,⁹ and it matters not that the director was entirely free from intent to injure the corporation or that the transaction was for its best interests.¹⁰ Thus, the fact that a note appears on its face to have been executed by a director on behalf of the corporation to himself is sufficient to charge his assignee with notice of want of authority to execute it.¹¹ A director is disqualified

holding that an allegation that the president of the corporation purchased the property at execution sales did not warrant setting aside the sales.

6. *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135.

7. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550. See *Wilbur v. Lynde*, 49 Cal. 290, 19 Am. Rep. 645, holding that express contract made by one acting in fiduciary capacity when dealing with himself is contrary to public policy and void.

8. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Sims v. Petaluma etc. Light Co.*, 131 Cal. 656, 63 Pac. 1011; *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Graves v. Mono Lake etc. Min. Co.*,

81 Cal. 303, 22 Pac. 665; *Shakespear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327, 20 Pac. 294; *Davis v. Rock Creek etc. Min. Co.*, 55 Cal. 359, 36 Am. Rep. 40; *Highland Park Inv. Co. v. List*, 42 Cal. App. 752, 184 Pac. 48; *O'Neill v. Quarnstrom*, 6 Cal. App. 469, 92 Pac. 391. See *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204, as to necessity of damage to the stockholder who seeks relief. See, also, TRUSTS.

9. *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496.

10. *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Sims v. Petaluma etc. Light Co.*, 131 Cal. 656, 63 Pac. 1011.

11. *Smith v. Los Angeles etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep.

from voting,¹² or in any way acting in his capacity as a director for the purpose of creating an obligation of the corporation in his own favor.¹³

§ 452. Corporation Represented by Other Officers.—

Under the rule that a trustee may, under certain circumstances, deal with his beneficiary,¹⁴ where the transaction was had under authority of the corporation given at a meeting of the directors, it is valid.¹⁵ A distinction is made between cases where an officer of the corporation as such deals with himself in an individual capacity concerning its corporate property without the knowledge and consent of the corporation or its stockholders, and those cases in which such officer consummates a transaction in his individual right with the consent of the corporation and without having himself taken part as an officer in the transaction.¹⁶ Thus, where the corporation is represented by its general manager, and the transaction is free from fraud, the fact that the party dealt with is a director does not render the contract void without regard to actual fairness or unfairness. The rule that where an officer deals with the corporation it is a violation of his trust applies only where his conduct is in the nature of an attempt to unite his personal and representative characters in the

53, 20 Pac. 677; *Wilbur v. Lynde*, 49 Cal. 290, 19 Am. Rep. 645 (holding note of corporation payable to acting trustees is void).

12. See *supra*, § 448.

13. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Curtin v. Salmon River etc. Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

14. See Civ. Code, § 2230; and see TRUSTS.

15. *Schnittger v. Old Home etc.*

Min. Co., 144 Cal. 603, 78 Pac. 9 (the underlying motive is not material where the corporation is in no respect injured thereby); *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024. See *supra*, § 448, as to interested directors voting.

16. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 22 Pac. 665; *Aetna Indemnity Co. v. Altadena Min. etc. Co.*, 11 Cal. App. 165, 104 Pac. 470.

same transaction, and where his official action is an essential part of the corporate action.¹⁷

§ 453. Officers as Creditors of Corporation.—Directors may advance money to the corporation by way of loan whenever they deem it for the interest of the corporation,¹⁸ upon terms as favorable as any on which it could have procured the money elsewhere.¹⁹ A person who is a creditor of a corporation is not deprived of his rights by reason of the fact that he is a director,²⁰ and he is not compelled to forego any rights he would have as creditor alone. Hence, a judgment against the corporation in favor of a director will be upheld, and in availing himself of the right of any creditor to levy an attachment, a director is not taking advantage of his position, since the rights asserted are entirely independent of his fiduciary status.¹ All that is forbidden to a director is the use of his position as trustee to obtain an advantage, as, for instance, as to interest or notes or other contracts for amounts in excess of the amount actually advanced.² Under his right to become a creditor of the corporation he may take from it a mortgage or any other security, and may enforce the same like any other creditor, but always subject to severe scrutiny and under the obligation of acting in the utmost good faith.³

17. *California etc. Land Co. v. Cuddeback*, 27 Cal. App. 450, 150 Pac. 379, per Conrey, J.

18. *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9 (need not disclose that they are real parties in interest where loan is made in name of another); *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; *Aetna Indemnity Co. v. Altadena Min. etc. Co.*, 11 Cal. App. 165, 104 Pac. 470; *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169; *Borland v. Haven*, 37 Fed. 394, 13 Sawy. 551.

Directors may likewise borrow

money from the corporation. *Pleasant Valley Hotel Co. v. Henderson*, 33 Cal. App. 76, 164 Pac. 420.

19. *Sutter St. Ry. Co. v. Baum*, 66 Cal. 44, 4 Pac. 916.

20. *Bonney v. Tilley*, 109 Cal. 346, 42 Pac. 439.

1. *Title Ins. & Tr. Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542.

2. *Sutter St. Ry. Co. v. Baum*, 66 Cal. 44, 4 Pac. 916. See *infra*, § 455, as to preferences.

3. *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Aetna Indemnity Co. v. Altadena*

§ 454. Purchase of Claims Against Corporation.—It is a fraud on the corporation and its creditors for directors to buy up at a discount outstanding debts and compel the corporation to pay the full face value thereof. In such case the directors may be compelled to turn over to the corporation the evidences of indebtedness upon being paid the money which they gave for them.⁴ If a director succeeds in purchasing the debts at any discount, to that extent he secures to himself an advantage not common to all of the stockholders, and to allow this to be done would, it has been held, be to permit a violation of his trust.⁵ The purchase of claims against the corporation by its agent does not extinguish the claims, however, unless made in violation of his duties or instructions. If he is empowered to make the purchase, they still subsist as claims against it, unless the corporation furnished or refunded to him the purchase money. If he acted without authority in effecting the purchase, while the purchase extinguishes the claims, it does not follow that the corporation is relieved of the indebtedness. It may thereby become indebted to the agent for the money which he expended.⁶

§ 455: Preferences Where Corporation is Insolvent.—Directors of an insolvent corporation who as creditors have claims against it must share ratably with other creditors in the distribution of the corporate assets.⁷ They cannot use their position to secure to themselves any preference or advantage over other creditors in the payment of their claims,⁸ or claims in which they are materi-

Min. etc. Co., 11 Cal. App. 165, 104 Pac. 470; Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169.

4. Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439.

5. Davis v. Rock Creek etc. M. Co., 55 Cal. 359, 36 Am. Rep. 40.

6. Sullivan v. Triunfo etc. Min. Co., 39 Cal. 459.

7. Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439.

8. Hanson v. Choydaki, 180 Cal. 275, 180 Pac. 816; Title Ins. & Tr. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542; Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439; Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169.

ally interested.⁹ And an officer may not properly compel the company to give him a preference over all other creditors before it can redeem corporate property to which he has secretly procured adverse title.¹⁰ Likewise, a creditor who resigned his position as director in order to accept a conveyance to himself of the corporate property will not be permitted to gain thereby an advantage over ordinary creditors.¹¹ Where a corporation is insolvent and it is apparent that directors or trustees are using their power and authority to benefit themselves at the expense of both creditors and stockholders, and the stockholders are interested in having the best terms possible made with creditors, the interest of creditors is sufficient to justify the interposition of a court of equity at their instance.¹²

§ 456. Right to Avoid Transaction.—Contracts entered into by an officer of a corporation to his own advantage and in violation of his trust are not ordinarily void, but are voidable only at the option of the corporation or its stockholders who are the beneficiaries.¹³ Whether a transaction of this kind is to be considered as void or merely voidable seems to depend upon the circumstances. If the interested director or officer deals with himself as the representative of the corporation, the transaction may be void without reference to its fairness or unfairness,¹⁴ while if the corporation is properly represented

9. *Title Ins. & Tr. Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542.

10. *Title Ins. & Tr. Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542 (applying the rule to a creditor who had taken control of the directorate and business of the corporation); *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135.

11. *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169.

12. *Hanson v. Choynski*, 180 Cal.

275, 180 Pac. 816, where a director in possession of funds sought to appropriate them to his own claim.

13. *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749 (holding, however, that if, after knowledge of the transaction the beneficiary does not elect to terminate the contract, he must be regarded as ratifying and confirming it). See cases cited *infra*, this section, and see *supra*, § 447.

14. See *supra*, § 451.

by other officers, the transaction is merely voidable.¹⁵ Again, where a majority of the directors are interested in the transaction, and the corporation is not properly represented by the minority, and there is no quorum, the transaction is absolutely void,¹⁶ whereas, if the presence of an interested director is not necessary to a quorum, but his vote is nevertheless necessary to authorize the act, the transaction is considered voidable only.¹⁷ In a case where, at the time of the transaction, the directors were the only stockholders and the only beneficiaries of the trust, the transaction is neither void nor voidable,¹⁸ for if all the beneficiaries are satisfied, a stranger to the transaction cannot complain.¹⁹

The right to avoid a contract of the kind under consideration must be exercised by the corporation or a stockholder acting for it and cannot be transferred to another.²⁰ Thus, in the absence of fraud, the rule is not available to one acting for creditors.¹ Creditors' rights depend, of course, upon acts in fraud of them; conse-

15. See *supra*, § 452.

16. *De Moulin v. Magnesite Ref. Co.*, 61 Cal. Dec. 751, 199 Pac. 42; *Goodell v. Verdugo etc. Water Co.*, 138 Cal. 308, 71 Pac. 354; *Lowe v. Los Angeles etc. Gas Co.*, 24 Cal. App. 367, 141 Pac. 399; *O'Neill v. Quarnstrom*, 6 Cal. App. 469, 92 Pac. 391; *In re McCarthy Portable Elevator Co.*, 201 Fed. 923, 120 C. C. A. 261; *S. C.*, 196 Fed. 247.

17. *Lackenbach v. Finn*, 26 Cal. App. 482, 147 Pac. 471. See *Graves v. Mono Lake etc. Co.*, 81 Cal. 303, 22 Pac. 665, where the transaction was said to be voidable at the election of the corporation whether fair and honest or not, the burden of proving fairness and honesty being on the interested party, and in

which case a majority were interested. See *supra*, §§ 439, 448.

18. *Sargent v. Palace Cafe Co.*, 175 Cal. 737, 167 Pac. 146; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Smith v. Ferries etc. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70; *Scales v. Holje*, 41 Cal. App. 733, 183 Pac. 308.

19. *Smith v. Pacific Bank*, 137 Cal. 363, 70 Pac. 184.

20. *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024.

1. *Lackenbach v. Finn*, 26 Cal. App. 482, 147 Pac. 471.

quently only such may complain as were creditors of the corporation at the time of the transaction.²

§ 457. Accounting for Secret Profits—Estoppel.—Any secret profit obtained by an officer or director by reason of violation or disregard by him of any obligations incident to the fiduciary relation cannot be retained, but must be accounted for to the corporation.³ Thus, if while the directors were negotiating for the purchase of property one of them secretly obtains title thereto and resells the property to the company at a profit, the profits so made may be recovered.⁴ Publicity of an illegal or unauthorized act of a director alone does not make it legal or valid.⁵ The beneficiaries of the trust may, however, estop themselves by express ratification or by laches or acquiescence;⁶ but upon these points the burden of proof is upon the director claiming the benefit of the contract.⁷ The laches or negligence of the board in not causing the contract made for their benefit to be set aside cannot work an estoppel against the corporation.⁸ If a director makes full and complete disclosure of the facts of the transaction which will benefit him, the transaction may, nevertheless, be completed by the votes of a majority of directors other than the interested director.⁹ And even though the majority of the directors are interested, the shareholders may, after fair and complete disclosure of all the circum-

2. *Scales v. Holje*, 41 Cal. App. 733, 183 Pac. 308.

3. *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498; *California Electric Light Co. v. California Safe Deposit etc. Co.*, 145 Cal. 124, 78 Pac. 372 (where an action was brought against the executor of a deceased person for secret commissions received by the decedent on a sale of corporate property).

4. *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162.

5. *Goodell v. Verdugo etc. Water Co.*, 138 Cal. 308, 71 Pac. 354.

6. *Goodell v. Verdugo etc. Co.*, 138 Cal. 308, 71 Pac. 354; *Fudickar v. East Riverside etc. Dist.*, 109 Cal. 29, 41 Pac. 1024.

7. *Fudickar v. East Riverside etc. Dist.*, 109 Cal. 29, 41 Pac. 1024.

8. *Goodell v. Verdugo etc. Water Co.*, 138 Cal. 308, 71 Pac. 354.

9. *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162.

stances, agree that the directors shall retain the special benefit that accrues.¹⁰

§ 458. **Recovery on Quantum Meruit.**—An action in the form of quantum meruit against the corporation for money expended and services performed in good faith for the use and benefit of the corporation may be maintained by directors although recovery may not be had for the amount upon an express contract.¹¹ And a judgment in a former action invalidating notes executed by directors to themselves for such amounts is not a bar to a subsequent action upon an account stated and quantum meruit for the amount remaining unpaid.¹² Accordingly, a director is entitled to recover for what the corporation has actually received in value, despite the fact that no recovery may be had on the contract with the corporation.¹³ Where a corporation comes into equity asking the rescission in whole or in part of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary to ascertain the sum to be repaid or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself, the corporation is not required to make tender of such amount as a condition of commencing the action; an offer to refund such sum as shall be decreed to be due is sufficient.¹⁴

10. *Goodell v. Verdugo etc. Co.*, 138 Cal. 308, 71 Pac. 354.

11. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Sims v. Petaluma etc. Co.*, 131 Cal. 656, 63 Pac. 1011; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29 (where one of two corporations having some directors in common brought the action on quantum meruit to recover moneys loaned and advanced to the other); *Shively v. Eureka Tellurium etc. Co.*, 5 Cal.

App. 236, 89 Pac. 1073. See *Graves v. Mono etc. Co.*, 81 Cal. 303, 22 Pac. 665, where the question was raised but not decided.

12. *Shively v. Eureka Tellurium etc. Co.*, 5 Cal. App. 236, 89 Pac. 1073.

13. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Sims v. Petaluma etc. Co.*, 131 Cal. 656, 63 Pac. 1011.

14. *Sutter St. R. Co. v. Baum*, 66 Cal. 44, 4 Pac. 916. See CANCELLA-

Compensation.

§ 459. In General.—An agent of a corporation, like any other agent, is entitled to receive for his services what they are reasonably worth.¹⁵ And stockholders, like all other persons laboring or rendering services for a corporation, are entitled to pay therefor.¹⁶ While a director is not entitled to compensation for his ordinary services as such,¹⁷ he is, in common with other officers, entitled to compensation for extraordinary or onerous services;¹⁸ and the rule applies even to de facto officers.¹⁹ Those officers who are to receive compensation are usually awarded regular salaries;²⁰ but if there is no provision for the payment of a salary, and no particular contract, the right to compensation must depend upon an implied contract arising out of the situation and relation of the parties.¹ Where the duties of an officer have been faithfully performed, he is not to be deprived of his salary to which he is entitled under a contract with the corporation merely because he holds another office in violation of the by-laws,² or because the work performed is not technically within the line of his duty as an officer. If performed by him at the request of the corporation, while holding the office,

TION OF INSTRUMENTS, vol. 4, p. 763 et seq.

15. *Fraylor v. Sonora Min. Co.*, 17 Cal. 594. See *infra*, § 461, as to implied contract for compensation. And see AGENCY, vol. 1, p. 808.

16. See *infra*, § 462.

17. See *infra*, § 463.

18. See *infra*, § 464.

19. *Shively v. Eureka etc. Co.*, 5 Cal. App. 236, 89 Pac. 1073.

20. *Fraylor v. Sonora Min. Co.*, 17 Cal. 594. See Civ. Code, § 303, subd. 5, as to provision in the by-laws for salaries.

1. *McCarthy v. Mt. Tecarte etc. Co.*, 111 Cal. 328, 43 Pac. 956; Ros-

borough v. Shasta River Canal Co., 22 Cal. 556; *Fraylor v. Sonora Min. Co.*, 17 Cal. 594.

Where the by-laws provide that the officers shall be elected by the directors and that the compensation and tenure of office of all officers other than directors shall be fixed by the directors, the general manager has no power to fix the compensation of a subordinate officer; *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324. See WORK AND LABOR.

2. *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

it will be presumed that he acted in an official capacity.³ If an officer is hired at a fixed salary and continues in the same employment after expiration of the term of his original hiring without a new contract, it is presumed that the parties intend the same compensation.⁴

If a corporate officer makes an agreement, upon valid consideration to forego and not charge any salary, the agreement is binding upon him, although other officers bound by similar agreements receive money from the corporation by improper methods.^{4a}

§ 460. Fixing of Salaries.—Directors may fix the salary of an officer, and a resolution of the board that the salary of a certain officer is a certain amount is a binding admission that the salary was so fixed. However, such admission is not evidence of a contract for salary prior to the beginning of the term mentioned in the resolution;⁵ such a resolution is applicable only to the salary during the specific period for which it provides.⁶ Directors cannot vote themselves salaries after their election as directors,⁷ nor can they in any instance vote a salary to one of their number as an officer when he takes part in the proceedings, or his vote is essential to the adoption of the resolution.⁸ Where a by-law provides that the compensa-

3. *Bee v. San Francisco etc. R. Co.*, 46 Cal. 248.

4. *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128, holding this to be the rule even though the original contract was made before incorporation of the business, and where the corporation is a one-man corporation. See MASTER AND SERVANT.

4a. *Ryan v. Pacific Axle Company*, 6 Cal. Unrep. 902, 68 Pac. 498.

5. *Smith v. Woodville etc. Co.*, 66 Cal. 398, 5 Pac. 688; *Bassett v. Fairchild*, 6 Cal. Unrep. 458, 61 Pac. 791, stating that assumpsit would lie for the services, the board of di-

rectors would certainly have power to pay the reasonable value of such services.

6. *Hygienic Health Food Co. v. Grant*, 36 Cal. App. Dec. 241, 62 Cal. Dec. 581, 63 Cal. Dec. 189, 202 Pac. 653 (where the corporation was permitted to recover excess salary paid after the expiration of the period to which resolution for increased salary applied).

7. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Shattuck v. Oakland etc. Co.*, 58 Cal. 550.

8. *Wickersham v. Crittenden*, 106 Cal. 327, 39 Pac. 602; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac.

tion of all officers, other than directors, shall be fixed by the board, this does not mean that the compensation must be expressly and definitely agreed upon and settled before performance of the services.⁹

§ 461. Implied Contract.—Where an officer's compensation has not been expressly fixed by the board of directors, his right to receive compensation is upon an implied contract and quantum meruit for whatever his services were reasonably worth.¹⁰ So, an understanding and expectation that payment is to be made, although not sufficient to amount to an agreement, may, nevertheless, remove all presumption that the services are performed gratuitously.¹¹ However, it is generally a question for the jury to determine whether services are of such a character and whether they were rendered under such circumstances that the person is entitled to compensation.¹² The right to compensation may be affected by usage of the corporation. If an officer was informed of the existence of a usage not to reward the services performed, the inference would naturally be that he accepted the office and performed the duties without any expectation of being compensated for his services.¹³ Any fact which can reasonably throw light upon the relation of the parties or tend to show the inten-

788; *Graves v. Mono etc. Co.*, 81 Cal. 303, 22 Pac. 665; *Shattuck v. Oakland etc. Co.*, 58 Cal. 550; *In re McCarthy Portable Elevator Co.*, 201 Fed. 923, 120 C. C. A. 261. S. C., 196 Fed. 247. See *Strouse v. Sylvester*, 6 Cal. Unrep. 798, 66 Pac. 660, where the salaries voted by directors to themselves was held to be a fraud on the corporation.

9. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082.

10. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082; *Bee v. San Francisco etc. R. Co.*, 46 Cal. 248; *Rosborough v. Shasta*

etc. C. Co., 22 Cal. 556; *Bank of Mendocino v. Brown*, 8 Cal. App. 566, 97 Pac. 533. See *WORK AND LABOR*.

11. *Rosborough v. Shasta etc. C. Co.*, 22 Cal. 556.

12. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082.

13. *McCarthy v. Mt. Tecarte etc. Co.*, 111 Cal. 328, 43 Pac. 956; *Fraylor v. Sonora Min. Co.*, 17 Cal. 594 (holding that one's position as officer is sufficient prima facie to charge him with knowledge of the existence of such a usage).

tion of the parties is relevant and admissible.¹⁴ Where an officer is employed at an annual salary payable monthly and the employment is continued for the first part of the next year, the presumption arises that the employment was renewed for the same salary and term as the previous year.¹⁵ But no contract can be implied entitling an officer to receive the same salary as was paid his predecessor where it does not appear that he knew the amount of such salary.¹⁶

§ 462. Holding of Stock as Affecting Compensation.—

The fact that an officer seeking recovery for services is a stockholder or is otherwise interested in the corporation does not preclude him from recovering either upon an express agreement or upon an implied contract for compensation, although the fact may be shown as evidentiary upon the question as to whether or not any promise, either express or implied, ever existed to pay for his services.¹⁷ Stockholders, however, like all other persons laboring or rendering services for a corporation are entitled to pay therefor, and if there be no special contract for compensation, the law will presume an implied contract to pay what the services are reasonably worth.¹⁸

14. *McCarthy v. Mt. Tecarte etc. Co.*, 111 Cal. 328, 43 Pac. 956; *Barstow v. City R. Co.*, 42 Cal. 465 (holding that a by-law providing that no director should receive compensation for his services as such is erroneously excluded from evidence); *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128.

15. *Gabriel v. Bank of Suisun*, 145 Cal. 266, 78 Pac. 736 (holding that the minutes of the directors of the corporation cannot be considered as conclusive evidence of the terms of the contract of employment

where the employee had no knowledge thereof). See *MASTER AND SERVANT*.

16. *Carver v. San Joaquin etc. Co.*, 16 Cal. App. 572, 118 Pac. 91.

17. *Allen v. Central Counties etc. Co.*, 21 Cal. App. 163, 131 Pac. 78 (on claim for services as secretary).

18. *Rosborough v. Shasta etc. Co.*, 22 Cal. 556. See note, 3 A. L. R. 778, as to right of stockholder not a director, officer or employee of the corporation to compensation for services in selling stock or corporate property in absence of express contract.

§ 463. Compensation of Directors in General.—A director in a corporation is not entitled to any compensation for his services as such, in the absence of any agreement in advance.¹⁹ But this rule has reference to such ordinary services as are usually rendered by directors without pay, for the common understanding is that such services are presumed to be rendered gratuitously, however valuable they may be.²⁰ Thus, where the duty is imposed upon directors by law to assist in obtaining subscriptions to the capital stock of the corporation, any work done by a director in that behalf must be held to have been done in execution of his trust as such director, and for such work he is not entitled to compensation.¹

But a director may serve the corporation in another and different capacity, and for such services compensation may very properly be allowed. And so, an attorney for a corporation, notwithstanding the fact that he is the president thereof, and occupying a position of trust, is entitled to compensation for services rendered in an action by the corporation to foreclose a mortgage which provides for an attorney's fee to be paid by the mortgagor.²

§ 464. Extra or Onerous Services.—The presumption that services are gratuitous does not apply to those onerous services performed by officers and agents of a corporation, even though they be also directors, for which compensation is usually demanded and allowed, and which could not reasonably be expected to be performed without

19. *Brown v. Valley View Min. Co.*, 127 Cal. 630, 60 Pac. 424 (holding that a substitute cannot, therefore, be in any better position for the performance of services within the duties of a director); *McCarthy v. Mt. Tecarte etc. Co.*, 111 Cal. 323, 43 Pac. 956; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

20. *Bassett v. Fairchild*, 132 Cal.

637, 52 L. R. A. 611, 64 Pac. 1082; S. C., 6 Cal. Unrep. 458, 61 Pac. 791.

1. *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498.

2. *International Indemnity Co. v. Bucher*, 31 Cal. App. Dec. 922, 189 Pac. 803.

reward.³ A director may, therefore, become entitled to compensation for services rendered where the circumstances are such as to raise an implied assumpsit to pay what they are reasonably worth;⁴ hence, a director is not precluded from having a legal claim for the value of his services as vice-president and manager, merely because his compensation had not been fixed beforehand.⁵ But it has been held that the assumpsit does not arise out of the mere fact of a director's appointment to an office such as superintendent, as might be the case if he were a stranger.⁶ In the same way, it has been held that a secretary may be compensated for extra services performed by him, and that he did perform such services and received only a reasonable compensation therefor must be assumed from a resolution passed by the directors authorizing payment therefor.⁷

Authority of Officers and Agents in General.

§ 465. In General.—It is elementary that a corporation can act only through its officers or agents.⁸ Under the

3. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082; S. C., 6 Cal. Unrep. 458, 61 Pac. 791. See *International Indemnity Co. v. Bucher*, 31 Cal. App. Dec. 922, 189 Pac. 803, where attorney's fees were allowed in foreclosure although the attorney was president and director of the mortgage corporation.

4. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082; *McCarthy v. Mt. Tecarte etc. Co.*, 111 Cal. 328, 43 Pac. 956; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Barstow v. City R. Co.*, 42 Cal. 465 (holding that the fact that the person performing services is a director in itself tends in some degree to weaken the presumption of

a promise to pay by the corporation). See *Graves v. Mono etc. Co.*, 81 Cal. 303, 22 Pac. 665, where the point was suggested that a director might recover the value of services rendered outside of the duties of his office on a proper showing.

5. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082.

6. *McCarthy v. Mt. Tecarte etc. Co.*, 111 Cal. 328, 43 Pac. 956; *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324 (where, however, the appointment had not been ratified).

7. *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786 (secretary).

8. *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Otis Elevator Co. v. First Nat. Bank*, 163 Cal. 31, 41 L. R. A.

statute the corporate powers reside in the board of directors;⁹ hence all the powers of other officers and subordinate agents are derived from the by-laws or from the board of directors itself,¹⁰ either by express or implied authorization, or by an estoppel equal to prior authority, or by ratification.¹¹ Although power is vested in the board of directors by law, the board usually delegates power to the various officers, and it is customary and proper to select a member of the board or even a third person as a general manager to attend to the details of the business.¹²

In general, it will be found that the rules of agency apply to officers and subordinate agents of corporations in ascertaining their authority and in fixing the measure of their obligations to the corporation and to third persons.¹³

§ 466. Appointment and Term.—Although directors must be elected annually, it does not follow that the mere clerks and servants of the corporation should hold their appointments by the same tenure.¹⁴ Thus, the office of secretary is not an annual office, where neither the by-laws nor the charter of the corporation do not so provide.¹⁵ And the directors have power to appoint a secretary to hold until the further order of the board.¹⁶ Where agents

(N. S.) 529, 124 Pac. 704; *Scott Stamp etc. Co., Ltd., v. Teake*, 9 Cal. App. 511, 99 Pac. 731; *Maier Packing Co. v. Frey*, 5 Cal. App. 80, 89 Pac. 875; *Bullock v. Consumers Lbr. Co.*, 3 Cal. Unrep. 609, 31 Pac. 367.

The very nature of commercial corporations requires that the authority to transact their business affairs shall be vested in some one or more persons. *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 123 Pac. 212.

9. See Civ. Code, § 305; and *supra*, § 440.

10. See *supra*, § 441.

11. See *infra*, § 471, as to ostensible authority. And *infra*, § 489 et seq., as to ratification and estoppel.

12. See *infra*, § 480.

13. See *AGENCY*, vol. 1, p. 712 et seq., as to authority of agents.

14. *Humboldt Sav. etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920.

15. *Humboldt Sav. etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920.

16. *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. 59.

have no interest coupled with their agency, it is competent for the corporation to remove them at any time and appoint other agents in their place.¹⁷ Since the duty of selecting officers devolves upon the directors, it has been held that it is not a matter within the power of the organizers of the company.¹⁸

§ 467. Pleading Corporate Contracts Sued upon.—In suing upon a corporation contract it is not necessary to allege that the execution thereof was authorized by resolution of the board of directors, since this is evidentiary matter, and it would be contrary to the rules of good pleading to aver it in the complaint.¹⁹ Thus, in an action for services, although the allegation that the plaintiff was employed by the defendant corporation through its secretary is sufficient, yet it has been said to be better pleading to omit reference to the secretary.²⁰ It is sufficient to allege that the corporation made and entered into an agreement by its president,¹ or president and secretary, as the case may be;² and a complaint is not subject to demurrer for failure to allege that the officers were duly authorized to execute the agreement, since such authority will be ordinarily presumed,³ or if the officer had no authority to make the contract, this is a matter of defense.⁴

17. *San Joaquin L. & W. Co. v. West*, 94 Cal. 399, 29 Pac. 785. See AGENCY, vol. 1. p. 699 et seq.

18. *Rideout v. National etc. Assn.*, 14 Cal. App. 349, 112 Pac. 192.

19. *Union Trust Co. v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615.

20. *Sullivan v. Grass Valley etc. Co.*, 77 Cal. 418, 19 Pac. 757.

1. *Malone v. Crescent City etc. Co.*, 77 Cal. 38, 18 Pac. 858.

2. *Rowe v. Table Mt. Water Co.*, 10 Cal. 441.

3. *Union Trust Co. v. Ensign-Baker Ref. Co.*, 29 Cal. App. 641,

157 Pac. 613. But see *Thomas v. Newmark Grain Co.*, 40 Cal. App. 491, 181 Pac. 72, to the effect that a complaint fails to state a cause of action where it appears from the instrument that it was executed by a person in charge of the business of the corporation, but there is no allegation showing that his authority included power to execute a writing such as that sued on. See *infra*, § 468, as to presumption of authority.

4. *Malone v. Crescent City etc. Co.*, 77 Cal. 38, 18 Pac. 858; *Union Trust Co. v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615.

§ 468. Proof or Presumption as to Authority.—To properly prove a contract claimed to be binding on a corporation, it should be shown that it was made on its behalf by someone who had authority to act for it.⁵ It must be shown that the officer was expressly authorized, or that the act was fairly within the implied powers incidental to his office, or that the corporation is estopped to deny his authority by reason of having accepted the benefit of the contract or otherwise.⁶ Where the corporate seal is used there is, of course, a presumption of authority,⁷ but where the seal is not used, the authority must otherwise affirmatively appear; a mere recital of such authority in the instrument itself is not sufficient.⁸ Such authority need not necessarily be by resolution,⁹ but may be shown by parol;¹⁰ and ostensible authority to act cannot be overcome by proof that the by-laws and minutes of the corporation do not disclose that such authority has been conferred.¹¹ Where no question of ratification or estoppel is involved, the by-laws are admissible for the purpose of

5. *Reed v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; *Chandler v. Robinett*, 21 Cal. App. 333, 131 Pac. 891. See note, 3 A. L. R. 132, as to necessity of showing authority or qualification of affiant in affidavit made in behalf of corporation.

6. *Butler v. Solano Land Co.*, 31 Cal. App. Dec. 509, 188 Pac. 1019.

7. See *supra*, § 95.

8. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

9. See *infra*, § 469.

10. *Carey v. Philadelphia etc. Co.*, 33 Cal. 694. See *AGENCY*, vol. 1, p. 746.

It may be shown that the person whose authority is in question does business for the corporation as agent with the knowledge and ac-

quiescence of the corporation and its officers, or by their direction, and the company is bound by his acts within the scope of the business intrusted to him; *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905; *City of Venice v. Short Line etc. Co.*, 180 Cal. 447, 181 Pac. 658; *Crowley v. Genesee Min. Co.*, 55 Cal. 273. See *AGENCY*, vol. 1, p. 737 et seq.

A showing of authorization may be presumed to have been made where a public body has acted on a paper signed by the corporation through an officer, since the action of such body is *prima facie* evidence of regularity. *San Francisco Paving Co. v. Bates*, 134 Cal. 39, 66 Pac. 2.

11. *Newton v. Johnston Organ etc. Co.*, 180 Cal. 185, 180 Pac. 7.

showing that the contract was not executed as they provide.¹²

Although there is dictum to the effect that an act pertaining to ordinary business is, when performed by its president and secretary, legally done and binding upon the corporation, yet no such presumption prevails when the act does not fall within the scope of the powers conferred upon and usually exercised by such officers as a part of the ordinary business of the corporation.¹³

§ 469. Necessity of Resolution, in General.—There was, as it has been pointed out in the cases, a period in the history of corporations when the most ordinary transactions were required to be authorized by solemn resolution of the board of directors duly entered in their records and authenticated by the corporate seal.¹⁴ However, it would greatly hamper the usefulness of corporations if all current transactions could be made only by such resolution.¹⁵ Consequently, the earlier requirements of the law have been greatly modified,¹⁶ and now it is held that not only is it not necessary to the validity of corporate transactions that they be authenticated by the corporate seal,¹⁷ but it is not absolutely necessary to their legality that their execution should have been authorized by a resolution of the board of directors previously adopted and entered on the books.¹⁸ Thus, the fact that the directors adopt no formal

12. *Northwestern Pkg. Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981.

13. *Mulligan v. Smith*, 59 Cal. 206. See *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, where it is said that it will be presumed that authority exercised by officers was properly delegated to them and that contracts made by them without authority have been ratified.

14. *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913.

15. *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 9, 124 Pac. 875.

16. *Leitch v. Marx*, 21 Cal. App. 208, 131 Pac. 328.

17. See *supra*, § 93 et seq., as to seal.

18. *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262; *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Cyclops Iron Works v. Chico etc. Co.*, 34 Cal. App. 10, 166 Pac. 821; *Leitch v. Marx*, 21 Cal. App. 208, 131 Pac. 328.

The rules for employment by private corporations are the same as for individuals. *Kelly v. Ning*

resolution conferring authority upon an officer is immaterial, for he may be shown to have apparent authority to act for the corporation,¹⁹ and such authority may be determined from all the circumstances.²⁰ And so, the appointment of an agent need not be made by resolution of the directors,¹ or under seal, but may be inferred from his relations to the corporation or from its course of business.² And in the case of a general manager even, a resolution appointing him has been held not to be necessary.³

A resolution of the stockholders and directors to purchase interests in property, subject to a contract for the return to third persons of advances made by them, and that the company assume the payment of said advances, amounts to an assumption to pay the advances upon which such third persons may recover.^{3a}

Yung Ben. Assn., 2 Cal. App. 460, 84 Pac. 321.

But see *infra*, § 470, as to authority to execute contracts required to be in writing.

19. *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634; *Eells v. Gray Bros. etc. Co.*, 13 Cal. App. 33, 108 Pac. 735.

20. *Betts v. Southern Cal. etc. Exch.*, 144 Cal. 402, 77 Pac. 993.

It is not the law that authority of an agent to act for the corporation can be proven only by the minutes of the board of directors. *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905; *City of Venice v. Short Line etc. Co.*, 180 Cal. 447, 181 Pac. 658; *Mining Co. v. Anglo-Cal. Bank*, 104 U. S. 192, 26 L. Ed. 707. See AGENCY, vol. 1, p. 737.

1. *Allen v. Central etc. Land Co.*, 21 Cal. App. 163, 131 Pac. 78; *Stockwell v. Barnum*, 7 Cal. App. 413, 94 Pac. 400.

2. *Crowley v. Genesee Min. Co.*, 55 Cal. 273; *Reardon v. Richmond Land Co.*, 21 Cal. App. 357, 131 Pac. 894.

3. *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 Pac. 86; *Hoffman v. Guy M. Rush Co.*, 27 Cal. App. 167, 149 Pac. 177.

3a. *Washer v. Independent Min. & Dev. Co.*, 142 Cal. 702, 76 Pac. 654. See dissenting opinion of Shaw, J., who was of the opinion that the theory on which recovery was had was unsound, since the plaintiff was not a party to the resolutions nor were they made at his instance, nor did they purport to be made, for his benefit. "It was a mere direction or authority from the principal to the agent and does not constitute a contract with or for the benefit of any person." *Angellotti, C. J.*, concurred in this dissent.

§ 470. When Authority Required to be in Writing.—In the case of a contract required to be in writing, such as for the sale of land, it is necessary that the authority of the agent should be in writing.⁴ In such a case a corporation can act only through its board of directors when duly assembled by resolution duly passed and recorded.⁵ Thus, a mortgage must be authorized by resolution of the board of directors.⁶ And to support the deed of a corporation, it is incumbent on the party relying on it to show affirmatively that it was executed by authority of a resolution of the directors entered on the records or that it was ratified by such a resolution;⁷ and to warrant officers in pledging corporate property for an antecedent debt, it has been held that some action in the nature of a resolution is necessary.⁸ The requisite authority can be inferred from the use of corporate seal,⁹ or can be proved by the record of the resolution.¹⁰ But section 2309 of the Civil Code requiring that an agents' authority to execute contracts in writing be in writing does not apply to the executive officers of a corporation, for such officers are something more than mere agents. They are representatives of the corporation itself.¹¹ In a case where the corporation sells

4. Civ. Code, § 2309. See AGENCY, vol. 1, p. 729.

5. *Salfield v. Sutter etc. Co.*, 94 Cal. 546, 29 Pac. 1105. But see *Stockwell v. Barnum*, 7 Cal. App. 413, 94 Pac. 400, holding that the appointment of an agent to sell under a trust deed is not the making nor authorizing of a sale of the corporation's own real estate and that in such case a resolution is unnecessary.

6. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373, holding that the levy of an assessment to pay the debt secured by the mortgage does not render the mortgage valid when a resolution is required.

7. *Barney v. Pforr*, 117 Cal. 56, 48 Pac. 987; *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024; *Southern California Col. Assn. v. Bustamente*, 52 Cal. 192.

8. *Citizens' Sec. Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731.

9. See supra, § 95.

10. See supra, § 130, as to proving passage of resolution.

11. *McCartney v. Clover Valley Land etc. Co.*, 232 Fed. 697, 1 A. L. R. 1127, 146 C. C. A. 623. See note 1 A. L. R. 1132, as to applicability to corporate officers and employees of statute requiring agents' authority to be in writing.

part of its property to the directors, they cannot avoid obligation to pay therefor even though no resolution authorizing the transaction was passed, and because by the sale they willfully or otherwise exceeded their lawful authority.¹²

§ 471. Ostensible or Apparent Authority.—When a corporation by a long course of acquiescence holds out an officer or agent as having authority to do certain things, it cannot, after he has acted, repudiate his acts.¹³ And a corporation is bound by the acts of one who ostensibly is its general agent, although the agency has terminated in fact.¹⁴ That a corporation, like other principals, is bound by the acts of an agent within the apparent scope of the business intrusted to him is settled by numerous authorities.¹⁵ As stated in another article,¹⁶ the law does not permit third persons to suffer from acts of such agents by

12. *Stern v. McDonald*, 31 Cal. App. Dec. 1033, 190 Pac. 221.

13. *Union Oil Co. v. Purissima Hills Oil Co.*, 181 Cal. 479, 185 Pac. 381; *Nicholson v. Randall Banking Co.*, 130 Cal. 533, 62 Pac. 930. See AGENCY, vol. 1, p. 737 et seq.

14. *Swinnerton v. Argonaut Land etc. Co.*, 112 Cal. 375, 44 Pac. 719.

15. *Western Lithographic Co. v. Vanomar Produceers*, 61 Cal. Dec. 425, 197 Pac. 103; *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 11 A. L. R. 549, 191 Pac. 905; *City of Venice v. Short Line etc. Co.*, 180 Cal. 447, 181 Pac. 658; *Newton v. Johnston Organ etc. Co.*, 180 Cal. 185, 180 Pac. 7; *E. Aigeltinger Inc. v. Burke*, 176 Cal. 621, 169 Pac. 373; *Phillips v. Sanger Lbr. Co.*, 130 Cal. 431, 62 Pac. 749; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695; *Bergholdt v. Porter Bros. Co.*, 114 Cal. 681, 46 Pac. 738; *Pope v. Armsby Co.*, 111 Cal. 159, 43 Pac. 589; *Bates v. Cor-*

onado Beach Co., 109 Cal. 160, 41 Pac. 855; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Crowley v. Genesee Min. Co.*, 55 Cal. 273; *Carey v. Philadelphia etc. Co.*, 33 Cal. 694; *Allen v. Citizens Steam Nav. Co.*, 22 Cal. 28; *Rauer v. Nelson & Sons*, 35 Cal. App. Dec. 785, 200 Pac. 809; *Rattray v. Wickersheim Imp. Co.*, 36 Cal. App. 253, 171 Pac. 964; *Maybury Ranch Co. v. Devanney*, 33 Cal. App. 586, 165 Pac. 1020; *Eddy v. American Amusement Co.*, 21 Cal. App. 487, 132 Pac. 83; *Reardon v. Richmond Land Co.*, 21 Cal. App. 357, 131 Pac. 894; *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 123 Pac. 212; *West v. Will C. Prather & Co.*, 7 Cal. App. 81, 93 Pac. 892; *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 460, 84 Pac. 321; *Mining Co. v. Anglo-Cal. Bank*, 104 U. S. 192, 26 L. Ed. 707.

16. See AGENCY, vol. 1, p. 738.

the plea of lack of authority.¹⁷ The ostensible authority of an agent is not limited by private communications from the corporation to him,¹⁸ where the third person affected is in ignorance of such limitation,¹⁹ and no concealed resolution, however artfully worded, can give the corporation an advantage that would not belong to an individual.²⁰

§ 472. Admissions.—A corporation is not bound by the admissions of its members unless they act by its express authority.¹ So, also, an admission or declaration of an officer is inadmissible against the corporation² without proof of his authority to act for the corporation.³ While an officer of a corporation has power to bind it by admissions within the scope of his authority,³ he cannot do this where his interests are antagonistic.⁴ And an agent cannot bind the corporation by any declarations respecting the character of a transaction made subsequent thereto.⁵ Admissions are properly made by the governing body of the corporation;⁶ hence a resolution of the board of di-

17. *Commercial Sec. Co. v. Mosto Drug Co.*, 43 Cal. App. 162, 184 Pac. 964; *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 123 Pac. 212.

18. *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 Pac. 399; *Rattray v. Wickersheim Imp. Co.*, 36 Cal. App. 253, 171 Pac. 964; *Eddy v. American Amusement Co.*, 21 Cal. App. 487, 132 Pac. 83.

19. *Eells v. Gray Bros. etc. Co.*, 13 Cal. App. 33, 108 Pac. 735. See AGENCY, vol. 1, p. 743.

20. *Floyd v. Tierra Grande Dev. Co.*, 34 Cal. App. Dec. 707, 197 Pac. 684.

1. *Shay v. Tuolumne etc. Co.*, 6 Cal. 73.

2. *Petterson v. Stockton etc. R. Co.*, 134 Cal. 244, 66 Pac. 304.

3. *Abbott v. '76 Land & Water Co.*, 87 Cal. 323, 25 Pac. 693 (statements of the secretary are admissible against the corporation where he had charge of the business and acted for the corporation); *Green v. Ophir etc. Co.*, 45 Cal. 522; *Love v. Anchor Raisin etc. Co.*, 5 Cal. Unrep. 425, 45 Pac. 1044; *Bullock v. Consumers Lbr. Co.*, 3 Cal. Unrep. 609, 31 Pac. 367 (the manager of the corporation has authority to make admissions which will be evidence against the corporation).

4. *Love v. Anchor Raisin etc. Co.*, 5 Cal. Unrep. 425, 45 Pac. 1044.

5. *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

6. *In re American Guarantee etc. Co.*, 192 Fed. 405 (admission as to

rectors may be used as evidence of an admission of indebtedness.⁷ And a resolution reciting that a salary was fixed at a certain amount is competent evidence of the fact that an admission that the salary was so fixed.⁸

Particular Corporate Officers.

§ 473. **President, in General.**—The president of a corporation is the head thereof,⁹ and he has been said to be officially responsible for the corporate affairs.¹⁰ As president of the board of directors, he is required by law to be elected by the directors from among their number,¹¹ and is, therefore, necessarily a director of the corporation.¹²

It follows also that one not elected a director cannot be eligible to be president, and cannot be made such.¹³ Since the president is a director, he is subject to the fiduciary obligations incident to such relation.¹⁴ One who has been elected president, and has not resigned, but has left the county and retired from active participation in the affairs of the corporation is still president de jure, although a de facto president is acting.¹⁵

the fact of the dissolution of a corporation as resolved upon under authority of Cal. Code Civ. Proc., § 1227 et seq.).

7. *Borel v. Fellows Quartz Min. Co.*, 1 Cal. Unrep. 229.

8. *Smith v. Woodville Cons. etc. Co.*, 66 Cal. 398, 5 Pac. 688.

9. *Fresno etc. Co. v. Southern P. Co.*, 135 Cal. 202, 67 Pac. 773; *Balfour v. Fresno Canal etc. Co.*, 123 Cal. 395, 55 Pac. 1062; *Goodwin v. Central Broadway Bldg. Co.*, 21 Cal. App. 376, 131 Pac. 896.

10. *Drew v. Superior Court*, 180 Cal. 711, 182 Pac. 417, holding that the president is bound by a subpoena to appear on proceedings supplementary to execution to testify as to affairs of the corporation judg-

ment debtor. See *infra*, § 474, as to powers of president.

11. Civ. Code, § 308.

12. *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 63 Pac. 1011.

13. *Dulin v. Pacific etc. Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

14. *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496.

15. *Eel River Nav. Co. v. Struver*, 41 Cal. 616, holding that service of process on either would be sufficient as a service on the corporation. See *Mott Iron Works v. West Coast Plumbing S. Co.*, 113 Cal. 341, 45 Pac. 683, to the effect that whether one is president or has resigned is a question of fact.

§ 474. **Powers of President.**—Although the president of a corporation is the presiding officer of the board of directors, he has, merely by reason of holding such office and regardless of conferred or ostensible authority, no more power of management or disposal over the property and affairs of the corporation than any other single member of the board.¹⁶ He has no power, merely because he is president, to bind the corporation by contract, but rather, only such power as has been given him by the by-laws and by the board of directors, and such other powers as may arise from his having assumed and exercised authority in the past with the apparent consent and acquiescence of the corporation,¹⁷ or which are in the ordinary course and conduct of its business.¹⁸ Thus, the president, merely by virtue of his office, has no power to mortgage corporate real property,¹⁹ or alienate such property,²⁰ or make executory contracts of sale binding upon its real property;¹ nor has he authority merely by virtue

16. *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

17. *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494.

18. *Grummett v. Fresno Glazed Cement Pipe Co.*, 181 Cal. 509, 185 Pac. 388 (where it is said that any contract pertaining to the corporate affairs, and within the general powers of the president, when executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation); *Reardon v. Richmond Land Co.*, 21 Cal. App. 357, 131 Pac. 894 (holding that where services were rendered to and accepted by the corporation with the knowledge and consent of its president apparently in the ordinary course and conduct of its business,

this is sufficient evidence of the authority of the president to contract for the services). See, however, *Chadbourne v. Stockton etc. Soc.*, 4 Cal. Unrep. 535, 36 Pac. 127, to the effect that although the authority of a president will be presumed in the absence of proof, when he assumes to act for the corporation in a matter pertaining to usual business, this presumption does not obtain as to a prohibited business.

19. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373; *Bliss v. Kaweah etc. Co.*, 65 Cal. 502, 4 Pac. 507.

20. *Butler v. Solano Land Co.*, 31 Cal. App. Dec. 509, 188 Pac. 1019; *Neuhart v. Geo. K. Porter Co.*, 23 Cal. App. 526, 138 Pac. 951; *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981.

1. *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494; *Blen v.*

of his office, and without the sanction or ratification of the directors, to retain counsel for the corporation.² Where the president is authorized to act for the corporation, his declarations are admissible against it.³ But a corporation is not estopped by representations of its president made while acting in his own behalf.⁴

It is, of course, entirely within the powers of the directors to confer on the president, as agent and chief executive of the board, the power to incur indebtedness, negotiate loans, enter into contracts or agreements, and otherwise to act for the corporation.⁵ And where the president is authorized by the board to execute any contract he may see fit to make, or employ whom he pleases, such general authority can extend only to matters relating to the ordinary conduct of the corporate business.⁶

§ 475. Vice-president.—The vice-president acts in the place and stead of the president and is an officer recognized by the law in incorporated companies. It is no more necessary for a vice-president in an affidavit to set out the fact of his selection as an officer of the corporation than it would be for the president, secretary or other officer to do so.⁷ The vice-president may act in the absence of the president.⁸ And when so acting, he may sign cer-

Bear River etc. Co., 20 Cal. 602, 81 Am. Dec. 132 (where it is said that the president, as such, has no authority to bind the corporation by contracts except in relation to matters arising in the ordinary course of the business); *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981.

2. *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634; *Wickersham v. Crittenden*, 106 Cal. 329, 39 Pac. 603.

3. *Green v. Ophir etc. Co.*, 45 Cal. 522. *Christy v. Dana*, 42 Cal. 174.

4. *Perkins v. Cowles*, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711.

5. *McCormick v. Stockton etc. R. Co.*, 130 Cal. 100, 62 Pac. 269.

6. *Rideout v. National Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192. See note, 5 A. L. R. 1492, as to effect of by-laws on power of president of corporation to employ, control or discharge agents or subordinates.

7. *In re Close*, 106 Cal. 574, 39 Pac. 1067.

8. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946.

tificates of stock,⁹ or act as manager in the president's stead.¹⁰ The absence of the president from the principal place of business is sufficient absence within the meaning of by-laws authorizing the vice-president to act in his place, although probably a temporary absence during some part of the day would not authorize action by the vice-president where no emergency demands immediate action.¹¹

§ 476. Secretary, in General.—The secretary of a corporation is elected by the board of directors,¹² but the statute does not require that the secretary should be a member of the board. Of course, the by-laws might require that he be a director or a stockholder of the corporation.¹³ Where one acts as secretary, causing the records to be so authenticated, the corporation cannot object to the regularity of his appointment or repudiate obligations signed by him under direction of the board.¹⁴ The secretary is a mere ministerial officer,¹⁵ under the control of the manager and board of directors. His authority does not extend to the transaction of the ordinary affairs of the corporation upon his independent volition and judgment.¹⁶ He has charge of the books, records and entries of business transactions, and in such matters represents the corporation;¹⁷ and he is the proper person to have cus-

9. *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 Pac. 950.

10. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946.

11. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17 (where the vice-president was also secretary).

12. Civ. Code, § 308.

13. See *Wolf v. St. Louis etc. Co.*, 15 Cal. 319, where, apparently, the secretary was required to be a stockholder.

14. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594.

15. *McCord v. Martin*, 32 Cal. App. Dec. 404, 191 Pac. 89; *Preston v. Central Cal. etc. Co.*, 11 Cal. App. 190, 104 Pac. 462.

16. *Preston v. Central Cal. etc. Co.*, 11 Cal. App. 190, 104 Pac. 462.

17. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050. See *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496. (Since the secretary is in charge of the corporate books and records, a statement in an affidavit that he is secretary is substantially equivalent to a statement by him

tody of and to affix the corporate seal.¹⁸ Also, his signature is expressly required by statute to certificates of corporate stock.¹⁹

§ 477. Powers of Secretary.—The rule which forbids the president to exercise corporate powers, merely as incident of his office, applies to the secretary. In the absence of authority express or implied, it is clear that the secretary cannot transfer corporate property,²⁰ and such authority will not be presumed,¹ but must be affirmatively shown to exist.² He has no authority by virtue of his office to mortgage property of the corporation, nor has he such power in conjunction with the president,³ nor has he any inherent authority to assume any obligation on behalf of the corporation,⁴ nor to contract for it,⁵ nor to rescind contracts or release the parties to contracts of the corpora-

- that matters stated are true of his own knowledge.) See *Yamato v. Bank of Southern Cal.*, 170 Cal. 351, 149 Pac. 826, to effect that if the corporation allows the secretary to have access to its books and safe so that he may obtain stock which he thereafter pledges, the corporation is responsible for the loss.

The secretary must exercise reasonable diligence in the performance of the duties of his office; *Odd Fellows etc. Assn. v. James*, 63 Cal. 598, 49 Am. Rep. 107.

18. *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

19. Civ. Code, § 323.

20. *California Winemakers Corp. v. Sciaroni*, 139 Cal. 277, 72 Pac. 990; *Palo Alto etc. Assn. v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124.

1. *Buena Vista Oil Co. v. Park Bank of L. A.*, 39 Cal. App. 710, 180 Pac. 12; *Palo Alto etc. Assn. v.*

First Nat. Bank, 33 Cal. App. 214, 164 Pac. 1124.

2. *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; *Buena Vista Oil Co. v. Park Bank of L. A.*, 39 Cal. App. 710, 180 Pac. 12.

3. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373.

4. *Guernsey v. Johnson Organ etc. Co.*, 29 Cal. App. 699, 157 Pac. 527; *Johnson v. Reliance Automobile Co.*, 23 Cal. App. 222, 137 Pac. 603 (holding that the secretary of a corporation engaged in selling automobiles has no authority, as such, to use its name in entering cars in races and thereby render it liable for the consequences thereof).

5. *Thomasson v. Grace M. E. Church*, 113 Cal. 558, 45 Pac. 838; *Donaldson v. Orchard Crude Oil Co.*, 6 Cal. App. 641, 92 Pac. 1046.

tion, without authority from the board of directors.⁶ He has no authority by virtue of his office either to sign checks,⁷ or to indorse checks so as to bind the corporation.⁸ But, of course, one who is secretary may also have far more extensive functions than those ordinarily incident to his office; he may be clothed with the authority of a general manager, and his open and public exercise of the functions of such position is notice that he has such authority.⁹

§ 478. Treasurer.—Every corporation is required to have a treasurer who is elected by its board of directors,¹⁰ although he need not be a member of the board. His powers, like those of the secretary, are restricted in character.¹¹ The treasurer is the proper custodian of the funds of the corporation and the funds from an assessment upon stockholders are properly received by him.¹² While the treasurer may act as the representative of the corporation only when authorized so to do by the board of directors, it has been held that where a third party contracts with a corporation through the treasurer as its agent and the corporation is the real party in interest, an action for damages may be brought by the corporation for a breach of the contract, and parol evidence is admissible to show that the defendant knew that he was dealing with the corporation through the treasurer as its agent.¹³ And

6. Blair v. Brownstone Oil etc. Co., 17 Cal. App. 471, 120 Pac. 41.

7. Buena Vista Oil Co. v. Park Bank of L. A., 39 Cal. App. 710, 180 Pac. 12; Palo Alto etc. Assn. v. First Nat. Bank, 33 Cal. App. 214, 164 Pac. 1024.

8. Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 435; Palo Alto etc. Assn. v. First Nat. Bank, 33 Cal. App. 214, 164 Pac. 1124. See Santa Marina Co. v. Canadian Bank of Commerce, 254 Fed. 391, holding that where the secretary had in-

dorsed checks for years, he had authority to do so, which was not limited by the fact that the president and directors believed that the checks were deposited in the bank.

9. Betts v. Southern Cal. Fruit Exch., 144 Cal. 402, 77 Pac. 993.

10. Civ. Code, § 308.

11. See supra, § 477, as to the powers of the secretary.

12. Bay View etc. Assn. v. Williams, 50 Cal. 353.

13. Escondido Oil etc. Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040.

where a note is made payable to a corporation and is indorsed in the name of the corporation by its treasurer, the rule is that the possession of such instrument by the indorsee imparts prima facie that he is the lawful owner in the absence of any showing impeaching its validity.¹⁴

§ 479. Executive Committee.—The directors often delegate power to an executive committee, usually composed of members of the board. This has become a general practice where the board has many members and meetings are not frequently held. Where an executive committee has been authorized to make arrangements for the transfer of property to the corporation, the committee will have power to contract for that purpose and it is not necessary that it should formally report to the board before executing such a contract and attaching the corporate seal.¹⁵ And where a corporation indorsed a note as guarantor by an executive committee which, pursuant to authority under its charter and by-laws, it had authorized to act in its name, the corporation is bound by such indorsement.¹⁶ If two or more officers are made ex officio an executive committee, the power is not thereby conferred on any one of them to act alone in the execution of a contract for the corporation.¹⁷ It has been held that the directors constituting an executive committee may be sued by stockholders for negligent conduct in the management of the affairs of the corporation committed to their charge.¹⁸

14. *Linder Hardware Co. v. Pacific Sugar Corp.*, 17 Cal. App. 81, 118 Pac. 785, 789. (But see the dissenting opinion of Beatty, C. J., in this case to the effect that the treasurer of a trading corporation has no power as such to indorse the negotiable paper of the corporation for sale or discount in the absence of special authority.)

15. *Andres v. Fry*, 113 Cal. 124, 45 Pac. 534.

16. *Tilden v. Goldy Machine Co.*, 9 Cal. App. 9, 98 Pac. 39.

17. *Bonner Oil Co. v. Pennsylvania Oil Co.*, 150 Cal. 658, 89 Pac. 613.

18. *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 Pac. 704.

§ 480. Manager in General.—The manager is an officer of the corporation,¹⁹ and the words “managing agent” when used in a statute mean “manager.”²⁰ The duties of a manager are not identical with the duties of a director, but the position is one of trust, in the performance of which he is required to exercise reasonable skill, diligence and care and to act in the highest good faith toward the corporation; and any by-laws of which he has notice at the time of his contract of employment enter into such contract.¹ But a contract employing a manager for specified term, to take charge of and conduct the business of the corporation along such lines as he may deem expedient and best, does not have the effect of divesting the directors of authority to control the corporate affairs. Hence, the corporation may discharge him prior to the expiration of his contract where, in the execution of his duties, he violates resolutions of the board of directors.² And the fact that a corporation has a general manager whose supervision extends to all of its business does not exclude its right to vest in another agent the powers of a general manager representing the corporation in the conduct of some department of its business.³ The fact that a manager signs as president does not show he is not acting as general manager,⁴ and the same is true of a sig-

19. *Stockton Lbr. Co. v. Blodgett*, 3 Cal. App. 94, 84 Pac. 441.

20. *Pacific Coast Ry. Co. v. Superior Court*, 79 Cal. 103, 21 Pac. 609.

1. *San Pedro Lbr. Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410.

2. *Oliphant v. Home Builders*, 34 Cal. App. 720, 168 Pac. 700.

A by-law which restricts the powers of a president in signing instruments to those first approved by the board of directors does not restrict the power of the board to invest the manager with greater powers; *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289.

3. *Francis v. Independent etc. Co.*, 33 Cal. App. 482, 165 Pac. 716.

4. *California etc. Co. v. Cuddeback*, 27 Cal. App. 450, 150 Pac. 379.

The manager of the corporation is often the president of the corporation, but the fact that the president of a corporation signs an instrument as such, and not also as general manager, is immaterial; *Wells Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156, 39 Pac. 535.

nature by the secretary who is also general manager.⁵ In order to show that one is manager, it is not necessary that there should be shown to have been a resolution of the board of directors appointing him as such; it is sufficient that he be shown to be the manager de facto.⁶

It is no doubt true that it is the duty of the manager to surrender possession of the corporate premises upon notice to him that his contract with the company has been terminated and a demand by the officers of the corporation for the return of possession. However, since his possession arose by virtue of appointment or employment as manager, if he has never surrendered the possession so acquired, he is not guilty of forcible entry merely because the corporation declares his contract at an end and his right to possession forfeited. And if, under such circumstances, the corporation should forcibly drive him from the premises and take possession thereof it would itself be guilty of forcible entry, although as a matter of legal right it is entitled to possession. His conduct in forcibly ejecting agents of the corporation from his office or parts of the premises of which he has possession constitutes nothing more than a wrongful and forcible detention of a possession lawfully and peaceably acquired.^{6a}

§ 481. Powers of Manager.—In the case of a corporation organized for commercial purposes, its general manager, or whoever may be given immediate direction or control of its affairs, is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do, in respect to the management of the ordinary and usual affairs of the corporation, what the corporation itself could do within the scope of its authority.⁷ Hence,

5. Los Angeles Lighting Co. v. Los Angeles, 106 Cal. 156, 39 Pac. 535.

6. Brown v. Crown Gold M. Co., 150 Cal. 376, 89 Pac. 86; Hoffman v. Guy M. Bush Co., 27 Cal. App. 167, 149 Pac. 177.

6a. San Francisco & S. etc. Soc. v. Leonard, 17 Cal. App. 254, 119 Pac. 405, per Hart, J.

7. Western Lithograph Co. v. Vanomar Producers, 61 Cal. Dec. 425, 197 Pac. 103; Ray v. Borgfeldt, 169 Cal. 253, 146 Pac. 679; Betts

where authority to do some particular act within the ordinary affairs of the corporation is not specifically given to a particular officer, and is not specifically inhibited to the general managing officer, the power of the latter to perform such act will be inferred from his general authority.⁸ And his acts within the usual course of business warrant the inference that they are in accord with rules adopted by the board of directors.⁹

Therefore, a general manager may perform such acts as the following: making contracts for the corporation in the ordinary conduct of its affairs,¹⁰ including contracts of hire,¹¹ or of employment,¹² or of agency for the sale of

v. Southern Cal. etc. Exch., 144 Cal. 402, 77 Pac. 993; Bates v. Coronado Beach Co., 109 Cal. 160, 41 Pac. 855; Grieg v. Riordan, 99 Cal. 316, 33 Pac. 913; Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852; Seeley v. San Jose etc. Co., 59 Cal. 22; McKiernan v. Lenzen, 56 Cal. 61; Raftis v. McCloud Riv. Lbr. Co., 35 Cal. App. 397, 170 Pac. 176; Neuhaert v. Geo. K. Porter Co., 23 Cal. App. 526, 138 Pac. 951; Leitch v. Marx, 21 Cal. App. 208, 131 Pac. 328; Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 123 Pac. 212; Ramboz v. Stansbury, 13 Cal. App. 649, 110 Pac. 472; Preston v. Central Cal. etc. Co., 11 Cal. App. 190, 104 Pac. 462 (proof of execution of an instrument by the manager is prima facie proof of authority).

8. Grummett v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 Pac. 388; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 128 Pac. 399; Pope v. J. K. Armsby Co., 111 Cal. 159, 53 Pac. 589; Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 123 Pac. 212.

9. Lowe v. Yolo etc. W. Co., 157 Cal. 513, 108 Pac. 297; Michie Gro-

cery Co. v. Martin, 31 Cal. App. Dec. 306, 188 Pac. 615; Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177.

10. Ray v. Borgfeldt, 169 Cal. 253, 146 Pac. 679; Tevis v. Savage, 130 Cal. 411, 62 Pac. 611; Siebe v. Joshua Hendy M. Works, 86 Cal. 390, 25 Pac. 14 (for the purchase of machinery for the corporation, executing a note therefor); Crowley v. Genesee Min. Co., 55 Cal. 273; Shaver v. Bear River etc. Co., 10 Cal. 396 (for the purchase of an office for the corporation); Freyberg v. Los Angeles Brewing Co., 4 Cal. App. 403, 88 Pac. 378 (buying and selling property as a part of the ordinary business of the corporation).

11. Smith v. Sinbad Dev. Co., 11 Cal. App. 253, 104 Pac. 706. See Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889, holding that the fact that one is manager during the time labor is performed for the corporation does not postpone the lien of a mortgage held by him to liens acquired by such labor.

12. Scott v. Monte Cristo Oil etc. Co., 15 Cal. App. 453, 115 Pac. 64; Stockwell v. Barnum, 7 Cal. App.

land,¹³ or of lease of premises for the use of the corporation;¹⁴ the execution of notes;¹⁵ and the indorsement and transfer of commercial paper belonging to the corporation.¹⁶ As a representative of the corporation a manager may also assign a chose in action to a third person for collection,¹⁷ or to creditors in payment or as security for a debt of the corporation,¹⁸ and he may do any act suitable in his judgment to protect the interests of the corporation or preserve its property.¹⁹ He may also make admissions against the corporation in matters pertaining to the ordinary course of business;²⁰ and he may verify pleadings in its behalf.¹

§ 482. Limitation of Manager's Powers.—As a general rule, the power of the manager of a corporation, unless special authority is given him, is limited to the performance of such acts as are within the usual course of the

413, 94 Pac. 400 (employment of one to make a sale for the corporation in the execution of a trust).

13. *Pettibone v. Lake View Town Co.*, 134 Cal. 227, 66 Pac. 218.

14. *Hawley v. Gray Bros. etc. Co.*, 106 Cal. 337, 39 Pac. 609.

15. *McCormick v. Stockton etc. R. Co.*, 130 Cal. 100, 62 Pac. 267; *Francis v. Western Screen Co.*, 22 Cal. App. 32, 133 Pac. 327.

16. *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289; *Ramboz v. Stansbury*, 13 Cal. App. 649, 110 Pac. 472. But see *Muller v. Swanton*, 140 Cal. 249, 73 Pac. 994, holding that he has no authority after a note becomes due to promise the maker that he will look to another for payment, without some consideration for such a promise.

17. *Grieg v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445; *McKiernan v.*

Lenzen, 56 Cal. 61; *Leitch v. Marx*, 21 Cal. App. 208, 131 Pac. 328; *Preston v. Central Cal. etc. Co.*, 11 Cal. App. 190, 104 Pac. 462. See *Rigby v. Lowe*, 125 Cal. 613, 58 Pac. 153 (local manager for foreign corporation).

18. *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 109 Pac. 499. But see *Citizens' Sec. Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731, holding that he may not mortgage or pledge corporate property for antecedent debts without authority from the directors.

19. *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156, 39 Pac. 535.

20. *Lowe v. Yolo etc. W. Co.*, 157 Cal. 503, 108 Pac. 297; *Bullock v. Consumers Lbr. Co.*, 3 Cal. Unrep. 609, 31 Pac. 367.

1. *Stockton Lbr. Co. v. Blodgett*, 3 Cal. App. 94, 84 Pac. 441.

business of the corporation.² Where an act is outside the usual course of business and beyond the powers ordinarily reposed in managers of such corporations, evidence of special authority is necessary.³ It has been held that the sale of stock and determination of the selling price and employment of sales agents for the stock is not within the scope of business which the president or general manager is qualified to transact by virtue of his office.⁴ Where it is provided that the directors shall elect and fix the compensation of all officers, the manager cannot exercise such power.⁵ But where his powers must be exercised "under the direction of the president," it has been held that this does not mean that the sanction of the president to every detail of every transaction is a condition precedent to the authority of the manager to contract.⁶

Bonds of Officers.

§ 483. **In General.**—There are no provisions of law in California requiring the bonding of officers of private corporations.⁷ Although the charter or by-laws of a corporation do not require officers to give bonds, a particular officer may be required at any time to give a bond as a condition to his retention of office, and if the instrument is voluntarily executed, it is given for a sufficient consideration.⁸ Bonds given to private corporations and the

2. Centerville etc. Co. v. Sanger etc. Co., 140 Cal. 385, 73 Pac. 1079; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 Pac. 121; Neuhart v. Geo. K. Porter Co., 23 Cal. App. 526, 138 Pac. 951.

3. Williams v. Youtz, 178 Cal. 107, 172 Pac. 383; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106 (holding that the settlement of a defalcation by the acceptance of a deed to real estate is not a transaction within the ordinary powers of the corporation).

4. Rattray v. Wickersheim Imp. Co., 36 Cal. App. 253, 171 Pac. 964.

5. Colpe v. Jubilee Min. Co., 2 Cal. App. 393, 84 Pac. 324.

6. Simpson v. Malter, 43 Cal. App. 662, 185 Pac. 675; Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 123 Pac. 212.

7. As to bonds of public officers, see PUBLIC OFFICERS. As to bonds of bank officers, see BANKS, vol. 4, p. 168.

8. Fresno Enterprise Co. v. Allen, 67 Cal. 505, 8 Pac. 59.

matters to which they relate are subjects of private contract in regard to which the parties may bind themselves in any manner or to any extent not violative of public policy or positive statute.⁹ And such contracts are to be interpreted, like other private contracts, with reference to their language and to the circumstances under which they are entered into.¹⁰ The provisions of the by-laws defining the duties of an officer, in existence at the time of the execution of the bond, enter into the contract of the sureties and constitute a part of it.¹¹

§ 484. Term of Bond.—If a bond be given for the term of office and until the officer's successor is elected and qualified, it is doubtful whether the corporation, by omitting to name a successor, can render the sureties liable for an indefinite period.¹² There is no reason, however, why sureties may contract to be responsible for the conduct of an officer so long as he shall continue in office. Thus, if the bond covers the period during which he shall hold office and the officer is appointed to continue in office during the will of the present or any future board of directors, and this is recited in the bond, the liability is not limited to the period for which the directors are elected.¹³ But if the bond does not provide that the obligors shall be responsible during the time that the officer shall continue as such or contain other like condition, but merely recites that he is such officer, the sureties cannot be held to answer for all defalcations which may happen during the remainder of the officer's natural life, in case he should

9. *Humboldt Sav. etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920; *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. 59; *Hubert v. Mendheim*, 64 Cal. 213, 30 Pac. 633. See SURETYSHIP.

10. *Humboldt Sav. etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920; *Fresno Enterprise Co. v. Allen*,

67 Cal. 505, 8 Pac. 59. See Civ. Code, § 2837. See SURETYSHIP.

11. *Humboldt Sav. etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920.

12. *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. 59.

13. *Humboldt Sav. etc. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920.

be reappointed and act as such officer. Where the bond is general but the term of office is limited in the by-laws, or where the term is not fixed in the charter or by-laws, but in the appointment itself, the sureties are not liable for defaults after the expiration of the limited time. And if the term is for a definite time, it is not rendered indefinite by the circumstances that the directors retain the right to remove, or by the right implied, if not expressly reserved, to dismiss the officer for cause in the meantime.¹⁴

§ 485. Liability on Bond for Defalcations.—The liability of an officer of a corporation on his bond is no greater than, nor is it different from, that of the sureties. Of course, he is liable in a direct action for moneys of the corporation which he has misappropriated, but the liability of each of the sureties who executes the specific contract is the same.¹⁵ The general rule is that the obligee is bound to show a conversion after the execution of the bond sued on. Thus, if the officer is a defaulter at the time of the execution of the bond, the sureties are not liable for such dereliction; and where a second bond is executed, they are not liable for money converted by the officer prior to its execution.¹⁶ Under the rule that sureties are liable only during the term for which the bond is given,¹⁷ it has been held that if money is collected and paid in by the officer prior to the execution of the bond, it goes to pay off any prior defalcation and the same is true if the money comes from his private funds. But if collected subsequent to the execution of the bond, at least in the absence of direct instructions from the officer to apply the money to the prior indebtedness, the corporation cannot so appropriate it and thus render the sureties liable for delinquencies.¹⁸ Failure to pay over money to the treasurer forth-

14. *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. 59.

15. *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. 59. See SURETY-SHIP.

16. *Anaheim etc. Water Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048.

17. See *supra*, § 484.

18. *Anaheim etc. Water Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048.

with as required by the by-laws or at any other specified time may be merely a breach of duty not amounting to a default, but it is an important element in determining whether there has been a default that there has been a long delay unaccounted for in the payment of the money in violation of some statutory provision or by-law.¹⁹

The question as to what constitutes a default depends to a large extent upon the terms of the bond.²⁰ Knowledge of the corporate officers of a default under the bond, not communicated to the sureties, will not release them unless there is fraud,—an actual intent to conceal or culpable negligence.¹ And where a proceeding against the sureties is delayed at their written request and upon their written agreement to waive all advantage which might result from the delay, they cannot set up the statute of limitations which, had the delay been otherwise caused, might be pleaded in bar of the action.²

Imputing Knowledge Between Corporation and Officer.

§ 486. In General.—In no other way than through its officers or agents or its records can a corporation have knowledge.³ If the corporation has full means of knowledge by inquiry, its actual knowledge, like that of an individual under similar circumstances, is immaterial.⁴ The

19. Anaheim etc. Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1048.

20. See State L. & T. Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600, as to acts constituting default. And see Humboldt Sav. etc. Soc. v. Wenerhold, 81 Cal. 528, 22 Pac. 920, construing provision of by-laws defining the duties of the officer. See also supra, § 483, as to the bond in general.

1. Anaheim etc. Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1048.

2. State L. & T. Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600.

3. Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496; Balfour v. Fresno Canal etc. Co., 123 Cal. 395, 55 Pac. 1062; Sloane v. Southern Cal. R. Co., 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; Lothian v. Wood, 55 Cal. 159; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Citizens' Bank v. Stewart, 22 Cal. App. 91, 133 Pac. 337.

4. Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339.

familiar rule that a principal is bound by the knowledge of his agent acquired in the course of the agency⁵ is applicable to corporations.⁶ Hence, the knowledge of officers within the scope of their duties and employment becomes the knowledge of the corporation.⁷ The rule rests upon the presumption that the agent will communicate to the corporation the facts learned by him, as it is his duty to do,⁸ and whether he performs such duty or not the corporation is bound.⁹ The corporation is presumed, therefore, to have full notice of everything which is known to the managing officers,¹⁰ its president,¹¹ or one who is secretary and director.¹² These rules of presumptive knowledge are applicable to the pleadings in an action,¹³ and where an officer verifies a pleading the corporation is

5. See AGENCY, vol. 1, p. 846 et seq.

6. *McKenney v. Ellsworth*, 165 Cal. 326, 132 Pac. 75; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. And see generally cases cited in this section.

7. *Montecito Valley W. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Balfour v. Fresno Canal etc. Co.*, 123 Cal. 395, 55 Pac. 1062; *Lothian v. Wood*, 55 Cal. 159; *Phelps v. Maxwell's etc. Co.*, 49 Cal. 337.

8. *McKenney v. Ellsworth*, 165 Cal. 326, 132 Pac. 75; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Palo Alto etc. Assn. v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124. As to knowledge of bank officers being imputed to banks, see *BANKS*, vol. 4, p. 162.

9. *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638.

10. *Newell-Murdoch R. Co. v. Wickham*, 183 Cal. 39, 190 Pac. 359.

11. *Balfour v. Fresno Canal etc. Co.*, 123 Cal. 395, 55 Pac. 1062; *Illinois Tr. & Sav. Bank v. Pac. Ry.*

Co., 117 Cal. 332, 49 Pac. 197; *Phelps v. Maxwell's etc. Co.*, 49 Cal. 337; *Witter v. McCarthy Co.*, 5 Cal. Unrep. 267, 43 Pac. 969; *Tidewater So. R. Co. v. Harney*, 32 Cal. App. 253, 162 Pac. 664; *Dickinson v. Zubiato Min. Co.*, 11 Cal. App. 656, 106 Pac. 123.

Since the president is the head of the corporation and it is his duty to report to the trustees information affecting its interests, the presumption usually is conclusive that he does so; hence he is a proper person to whom notice which is to affect the corporation is to be given; *Fresno Canal etc. Co. v. Southern Pac. Co.*, 135 Cal. 202, 67 Pac. 773; *Balfour v. Fresno Canal etc. Co.*, supra; *Goodwin v. Central Broadway Bldg. Co.*, 21 Cal. App. 376, 131 Pac. 896.

12. *Love v. Anchor Raisin etc. Co.*, 5 Cal. Unrep. 425, 45 Pac. 104f; *Dickinson v. Zubiato Min. Co.*, 11 Cal. App. 656, 106 Pac. 123.

13. *Sloane v. Southern Cal. etc. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

charged with knowledge of averments in the pleadings of the other party.¹⁴ Where, also, a transaction is fully entered in the books of the corporation, notice is thus imparted to it,¹⁵ but this rule is for the protection of third persons and stockholders. It is disaffirmed where the matter complained of is one between the corporation and officers and agents who are the authors of the book entries.¹⁶

It is generally held that notice to a mere stockholder is not to be imputed to the corporation,¹⁷ unless such stockholder is practically the corporation and no other person has any interest in its property.¹⁸

§ 487. Knowledge Outside Scope of Duties.—Unless knowledge is acquired by an officer in the management and conduct of corporate business, it is not imputed to the corporation.¹⁹ And if an agent acquires his knowledge casually or privately, or by rumor, and does not inform the corporation or its officers of it, the corporation is not chargeable.²⁰ So, where the duties of an officer of one corporation are such as to give him no knowledge of certain facts, his knowledge of such facts as officer of another

14. *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 Pac. 253.

15. *Phillips v. Sanger Lbr. Co.*, 130 Cal. 431, 62 Pac. 749. See *Nash v. Rosesteel*, 7 Cal. App. 504, 94 Pac. 850, where knowledge as to mistake in accounts was not imputed to directors, but where they were held justified in relying on data furnished by subordinates in declaring a dividend.

16. *Pacific Vinegar etc. Works v. Smith*, 152 Cal. 507, 93 Pac. 85.

17. *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834.

18. *Finnell v. Finnell*, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac.

740. See as to one-man corporations, *supra*, §§ 13, 14.

19. *Lothian v. Wood*, 55 Cal. 159; *Palo Alto etc. Assn. v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124; *Lowe v. Los Angeles etc. Co.*, 24 Cal. App. 367, 141 Pac. 399 (where a director was agent of another, his knowledge as a director of irregularities in the issue of bonds was held to have been acquired not in his capacity as agent but as director and therefore not imputable to his principal).

20. *Lothian v. Wood*, 55 Cal. 159, (director's knowledge as to materials used in building).

corporation is not chargeable to the first one.¹ While it is a rule that knowledge possessed by an officer while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to the corporation, even though such knowledge may have been acquired before the relation was created,² this rule is subject to the qualification that knowledge acquired before the commencement of the agency is not notice to the corporation unless it is shown or appears that such knowledge was present in the mind of the officer at the time he acted for it.³

§ 488. Effect of Adverse Interest of Officer.—The rule that knowledge of an officer acquired in the course of his duties is presumed to have been communicated to the corporation is subject to the exception that where his dealings were with the corporation in a transaction in his own behalf, it will not be presumed, as a general rule, that he communicated to the corporation facts affecting the transaction.⁴ This exception is itself subject to an exception, however. If the officer is in fact acting for the corporation in the transaction, even though he may have an

1. *Utah Const. Co. v. Western Pac. Ry. Co.*, 174 Cal. 156, 162 Pac. 631.

2. *Cooke v. Mesmer*, 164 Cal. 332, 128 Pac. 917.

3. *Cooke v. Mesmer*, 164 Cal. 332, 128 Pac. 917; *Christie v. Sherwood*, 113 Cal. 526, 45 Pac. 820; *Kiefhaber Lbr. Co. v. Newport Lbr. Co.*, 15 Cal. App. 37, 113 Pac. 691 (where the previous knowledge of a promoter was held not imputable to the corporation, of which he became a director, it not appearing that the fact was in mind). See AGENCY, vol. 1, p. 851, for full consideration of this rule.

4. *Los Angeles Inv. Co. v. Home Sav. Bk.*, 180 Cal. 601, 5 A. L. R.

1193, 182 Pac. 293; *McKenney v. Ellsworth*, 165 Cal. 326, 132 Pac. 75; *McDonald v. Randall*, 139 Cal. 246, 72 Pac. 997; *Palo Alto etc. Assn. v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124; *Kiefhaber Lbr. Co. v. Newport Lbr. Co.*, 15 Cal. App. 37, 113 Pac. 691 (where a director of the vendee corporation was a stockholder in the vendor corporation); *Rideout v. Nat. Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192 (holding that knowledge of two out of three directors who are interested in a contract is not knowledge of the corporation where the third member has no knowledge). See AGENCY, vol. 1, p. 852.

opposing personal interest, it is his duty, notwithstanding his interest, to communicate to his company any facts in his possession material to the transaction. In such case the law will presume in favor of third persons that he made such communication;⁵ and it is immaterial if he took some personal benefit from the fraud.⁶ Where the directors make inquiries as to matters and are deceived by the officer, who is adversely interested, and whose duty it is to tell them the truth, such officer cannot claim that by conclusive implication the corporation has knowledge of the transaction.⁷

Ratification and Estoppel.

§ 489. **In General.**—The doctrines of ratification and estoppel are, generally speaking, as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner and to the same extent as the latter,⁸ in the absence of charter restrictions.⁹ A corporation, like an individual, may create an agency and confer authority by subsequent ratification, as well as by precedent authority, and subsequent ratification by the corporation of the acts of its officers is ordinarily

5. *Williams v. Hasshagen*, 166 Cal. 386, 137 Pac. 9; *McKenney v. Ellsworth*, 165 Cal. 326, 132 Pac. 75; *Palo Alto etc. Assn. v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124; *State Sav. etc. Bank v. Winchester*, 25 Cal. App. 691, 145 Pac. 171; *Witter v. McCarthy Co.*, 5 Cal. Unrep. 267, 43 Pac. 969 (holding that where the president acted as attorney in fact for another in making an assignment to the corporation he was agent for both parties and both were chargeable with his knowledge).

6. *Williams v. Hasshagen*, 166 Cal.

386, 137 Pac. 9; *McKenney v. Ellsworth*, 165 Cal. 326, 132 Pac. 76; *National Bank of San Mateo v. Whitney*, 40 Cal. App. 276, 180 Pac. 845.

7. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

8. *Argenti v. City of San Francisco*, 16 Cal. 255. See *infra*, §§ 490–496, as to essentials of ratification by corporations; and *infra*, § 497, as to estoppel. See AGENCY, vol. 1, p. 766 et seq.

9. *Martin v. Zellerbach*, 1 Cal. Unrep. 335.

equivalent to precedent authorization.¹⁰ In other words, a ratifying resolution has the same effect as if the original resolution had been properly adopted, for the purpose of justifying action under it;¹¹ and it has been held that a ratification may afford conclusive proof that the officer had authority to perform the act in question.¹² A corporation may, by resolution, ratify the act of an officer done without previous authority, or it may ratify an act done in excess of the officer's authority.¹³ And a general ratification of acts is sufficient when knowledge of the specific transaction is present.¹⁴

§ 490. Knowledge of Material Facts.—Ratification will not, according to the general principles of agency, be presumed even where the corporation has received benefits of the transaction, unless actual knowledge of the specific act or contract out of which the benefits arose is made to appear,¹⁵ for without knowledge or notice, there can be no ratification;¹⁶ and the same knowledge is essential in con-

10. *California Nat. Supply Co. v. Flack*, 183 Cal. 124, 190 Pac. 634; *Title Ins. etc. Co. v. California Dev. Co.*, 168 Cal. 397, 143 Pac. 723; *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574; *Balfour v. Fresno etc. Co.*, 123 Cal. 395, 55 Pac. 1062; *Blood v. La Serena etc. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Boggs v. Lakeport etc. Assn.*, 111 Cal. 354, 43 Pac. 1106; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

11. *Pacific Vinegar etc. Works v. Smith*, 152 Cal. 507, 93 Pac. 85 (holding that a ratification is an acceptance of the responsibility of the act); *Wickersham v. Crittenden*, 110 Cal. 332, 42 Pac. 893; *Wickersham Banking Co. v. Nicholas*, 2 Cal. App. 18, 82 Pac. 1124.

12. *Balfour v. Fresno etc. Co.*, 123 Cal. 395, 55 Pac. 1062.

13. *People v. Eel River etc. Co.*, 98 Cal. 665, 33 Pac. 728.

14. *Bassett v. Fairchild*, 6 Cal. Unrep. 458, 61 Pac. 791. See *infra*, § 490, as to knowledge of facts.

15. *Hamilton v. Bates*, 4 Cal. Unrep. 371, 35 Pac. 304; *Rideout v. Nat. Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192. See *AGENCY*, vol. 1, p. 777 et seq.

16. *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Blair v. Brownstone Oil etc. Co.*, 17 Cal. App. 471, 120 Pac. 41; *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324; *Wickersham Banking Co. v. Nicholas*, 2 Cal. App. 18, 82 Pac. 1124.

sidering the question of estoppel.¹⁷ In the absence of any showing, knowledge cannot be presumed;¹⁸ and the knowledge of interested directors or officers is not sufficient where the matter complained of is one between the corporation itself and one of any of such officers.¹⁹ Ratification supposes knowledge of the act ratified,²⁰ and so, when a ratification has been proved, the inference follows that the provisions of the contract were known, unless mistake or misapprehension in the ratification is shown, in which case the presumption would be that such mistake continues throughout.²¹ The knowledge required is knowledge at the time of ratification; subsequent knowledge is immaterial with respect to a previous ratification, and would be material only as tending to show a subsequent ratification through the failure of the directors to act.¹ Actual knowledge, however, is not necessary, if the corporation has such notice as to put it upon inquiry,² and full knowledge may be presumed of facts known to an officer.³ Where an act or contract is ratified with imperfect knowledge of the facts, the corporation may refuse to be bound by the contract and may seek rescission.⁴ But the rule has no application where the corporation itself is insisting upon the contract, for it is not permitted to insist upon its

17. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Rideout v. Nat. Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192. See *infra*, § 497.

18. *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634. See *infra*, § 496, as to implied ratification.

19. *Pacific Vinegar etc. Works v. Smith*, 152 Cal. 507, 93 Pac. 85. See *Blen v. Bear River etc. Co.*, 20 Cal. 602, 81 Am. Dec. 132, where the court inclines to the opinion that it is not sufficient that the officer performing the act shall have knowledge in order to effect ratification.

20. See AGENCY, vol. 1, p. 777.

21. *Blen v. Bear River etc. Co.*, 20 Cal. 602, 81 Am. Dec. 132.

1. *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574; *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122 (holding, where one director subsequently received knowledge, that while the ratification was not express, it was implied from acquiescence with knowledge of the facts).

2. *Pope v. J. K. Armsby Co.*, 111 Cal. 159, 43 Pac. 589.

3. See *supra*, §§ 486-488.

4. *Balfour v. Fresno etc. Co.*, 123 Cal. 395, 55 Pac. 1062; Civ. Code, § 2314.

rights while repudiating its agent's representations which are material to the transaction.⁵

§ 491. Ratification in General.—A ratification by a corporation, as in the case of individuals, may be either express or implied,⁶ even as the act of conferring antecedent authority.⁷ It is not necessary to ratify in express and formal terms; anything is sufficient that clearly and necessarily implies a recognition of the obligation.⁸ And the power to ratify in a given mode supposes the power to contract in the same way. An act not performed according to the mode required is not capable of ratification in any other mode.⁹ Ratification operates upon a contract in exactly the same manner as though the authority to make the contract had existed originally;¹⁰ and it is not necessary to ratification by the corporation that the other party consent.¹¹ A corporation may ratify any unauthorized act, the doing of which it could in the first instance have authorized and empowered.¹² But if an act is contrary to law, it is incapable of ratification.¹³ A ratification

5. *Balfour v. Fresno etc. Co.*, 123 Cal. 395, 55 Pac. 1062.

6. *Martin v. Zellerbach*, 1 Cal. Unrep. 335. See *supra*, § 465 et seq., as to authority of corporate officers and agents generally; *infra*, § 495, as to express ratification; and *infra*, § 496, as to implied ratification.

7. *Pope v. J. K. Armsby Co.*, 111 Cal. 159, 43 Pac. 589.

8. *Porter v. Lassen County etc. Co.*, 127 Cal. 261, 59 Pac. 563.

An instrument to be ratified by the corporation need not be signed in the corporate name, and it is not necessary that the corporate name appear; *San Joaquin Valley Bank v. Gate City Oil Co.*, 170 Cal. 250,

149 Pac. 557. See *AGENCY*, vol. 1, p. 770 et seq.

9. *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

10. *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96. See note, 7 A. L. R. 1446, as to ratification by corporation of unauthorized contract entered into by officer, by acceptance and retention of benefits.

11. *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91.

12. *Blood v. La Serena etc. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

13. *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

need not be specially pleaded,¹⁴ for it is involved in the issue whether the instrument has been executed by the corporation.¹⁵ The burden of proving a ratification is upon the party seeking to take advantage of the act ratified;¹⁶ and proof of subsequent ratification is just as pertinent as proof of prior authority.¹⁷

§ 492. Time for Ratifying or Disaffirming.—Under the general code rule that no unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent,¹⁸ it has been held that while a subsequent ratification is equivalent to a precedent authority, this applies between the corporation and its agent only, and does not permit an act to be made valid to the prejudice of third persons.¹⁹ The ratification of an assignment which is not given until after the commencement of an action by the assignee on the account, therefore, is too late to avail the assignee anything, for he cannot recover on a cause of action accruing after he commences his action.²⁰ And a corporation cannot by ratification after suit brought take away the defense that the plaintiff had no interest in the claim sued on when the action was begun.¹ Pursuant to the same principle, the ratification of an appeal by an unauthorized attorney for a corporation cannot be ratified by it after the time for the appeal has expired.² Where

14. *Porter v. Lassen County etc. Co.*, 127 Cal. 261, 59 Pac. 563; *Boggs v. Lakeport etc. Assn.*, 111 Cal. 354, 43 Pac. 1106.

15. *Boggs v. Lakeport etc. Assn.*, 111 Cal. 354, 43 Pac. 1106.

16. *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634; *Martin v. Zellerbach*, 1 Cal. Unrep. 335.

17. *Porter v. Lassen County etc. Co.*, 127 Cal. 261, 59 Pac. 563. See for a general treatment of the foregoing principles, *AGENCY*, vol. 1, p. 766 et seq.

18. *Civ. Code*, § 2313.

19. *Title Ins. etc. Co. v. California Dev. Co.*, 168 Cal. 397, 143 Pac. 723. See *AGENCY*, vol. 1, p. 74 et seq.

20. *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555.

1. *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574 (involving an unlawful assignment and delegation of discretionary power by an attorney to whom originally the claim was assigned for collection).

2. *Title Ins. etc. Co. v. California Dev. Co.*, 168 Cal. 397, 143 Pac. 723.

a contract is made with an officer not authorized to make it, but is rescinded by the other party before it is ratified by the corporation, he will be free from its obligation; but the cases hold that the act of an unauthorized agent may be ratified at any time before the other party to the contract repudiates it.³ And since contracts are reciprocal, where the corporation can elect not to be bound by the contract, the same privilege must be accorded to the other contracting party.⁴

§ 493. Who may Ratify.—The usual corporate acts are within the power of the board of directors to ratify, and it has been held that the fact that some of the members of the corporation encouraged a contract does not estop it from objecting to such contract, there being no valid ratification.⁵ The irregular action of one board of directors may be ratified by a succeeding board of directors.⁶ It is competent for stockholders to ratify by their subsequent approval any act which they might originally have authorized.⁷ Thus, stockholders having power to provide compensation for directors and officers, may ratify acts of directors in granting compensation.⁸ And acts of directors in violation of a by-law may be ratified by the stockholders who could enact the by-law.⁹ In some instances, statutes require the ratification of acts of directors by the stockholders,¹⁰ in which event the stockholders become a component part of the authorizing

3. *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 1096; *Salfeld v. Sutter County etc. Co.*, 94 Cal. 546, 29 Pac. 1105.

4. *Salfeld v. Sutter County etc. Co.*, 94 Cal. 546, 29 Pac. 1105. See *CONTRACTS*, ante, p. 211.

5. *San Diego Water Co. v. San Diego Flume Co.*, 100 Cal. 43, 34 Pac. 656. And see cases cited *infra*, § 495, as to express ratification by directors.

6. *Wickersham v. Crittenden*, 110 Cal. 332, 42 Pac. 893.

7. *Forbes v. San Rafael Turnpike Co.*, 50 Cal. 340; *Bassett v. Fairchild*, 6 Cal. Unrep. 458, 61 Pac. 791.

8. *Bassett v. Fairchild*, 6 Cal. Unrep. 458, 61 Pac. 791.

9. *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

10. See *supra*, § 250.

power.¹¹ In general, only the same number of stockholders is required to ratify that would be necessary to authorize.¹² And so it has been held that it is not necessary that an act be ratified by unanimous consent of all stockholders, where it might be authorized by a majority in the first instance.¹³ Neither is express ratification in meeting necessary, but ratification may be presumed from the circumstances of the case. Thus, long acquiescence in acts beneficial to the corporation with knowledge of all the material facts is sufficient.¹⁴ But it is clear that stockholders may not ratify a prohibited transaction which they could not authorize in the first instance.¹⁵ A contract or act may be ratified by an officer who had authority in the first instance to authorize it.¹⁶

§ 494. Distinctions.—While there is a clear distinction between ratification and estoppel in pais,¹⁷ inasmuch as ratification may be complete without any of the elements of an estoppel,¹⁸ it has been held that in the case of im-

11. *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Curtin v. Salmon River etc. Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

12. *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

13. *San Diego etc. R. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333.

14. *San Diego etc. R. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333; *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

15. *Hedges v. Frink*, 174 Cal. 552, 163 Pac. 884 (transaction in violation of Civ. Code, § 309).

16. *Hawley v. Gray Bros. etc. Co.*, 106 Cal. 337, 39 Pac. 609 (holding that where there is no question as to the power of the president of a

corporation to execute a note in its behalf and the fact is undisputed in the record that the president authorized the manager to pay the note in suit as a liability of the corporation, he thereby ratified the act of the manager in executing the note); *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 123 Pac. 212.

17. See *AGENCY*, vol. 1, p. 767 et seq. And see *Blair v. Brownstone Oil etc. Co.*, 168 Cal. 632, 143 Pac. 1022, holding that where a finding of ratification is not supported by the proof, the appellate court cannot affirm the judgment if the facts tend to establish an estoppel in pais not found by the trial court.

18. *Curtin v. Salmon River etc. Co.*, 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851; *Blood v. La Serena etc. Co.*, 113 Cal. 221, 41 Pac. 1017,

plied ratification by the acceptance of benefits, the legal effect of either ratification or estoppel is precisely the same. Section 1589 of the Civil Code declares in effect that in such case there is a ratification.¹⁹ Applying the general distinction, it has been held that in a case where a contract is one required to be in writing, while acceptance and retention of benefits would not constitute ratification, the facts may nevertheless constitute an estoppel against the corporation.²⁰ And pursuant to the rule that while a ratification need not be pleaded,¹ as distinguished from the rule that an estoppel in pais must be pleaded,² where the question as to the estoppel of a corporation defendant by its conduct is not averred, such question is not properly involved in the case.³

§ 495. Express Ratification.—Under the code a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified.⁴ Thus, where the act is the making of a contract required by law to be in writing, it can only be authorized by resolution of the board of directors.⁵ And the cancellation of a written contract, therefore, can only be accomplished by formal act of the board of directors. Mere failure of the directors to do anything with reference to the agreement does not constitute ratification.⁶ Likewise,

45 Pac. 252; *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 Pac. 964. See **ESTOPPEL**.

19. *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 Pac. 964. See **CONTRACTS**, ante, p. 59, § 34, as to consent by assumption of benefits.

20. *West v. Will C. Prather & Co.*, 7 Cal. App. 81, 93 Pac. 892.

1. See *supra*, § 489. And see **AGENCY**, vol. 1, p. 768.

2. See **AGENCY**, vol. 1, p. 768; and see **ESTOPPEL**.

3. *Napa Valley Pkg. Co. v. San Francisco Funds*, 16 Cal. App. 461, 118 Pac. 469.

4. Civ. Code, § 2810. See **AGENCY**, vol. 1, pp. 76, 77.

5. *Blood v. La Serena etc. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252. As to contracts required to be in writing, see **CONTRACTS**, ante, p. 224; **FRAUDS, STATUTE OF**.

6. *Blair v. Brownstone Oil etc. Co.*, 163 Cal. 632, 143 Pac. 1022.

parol acts of ratification and acquiescence cannot aid an unauthorized conveyance.⁷ It will be seen that an express ratification and a ratification in writing are the same thing in the case of a corporation which can only confer authority in writing by resolution of its board of directors, duly passed and recorded.⁸ An attempted express ratification at a meeting not duly assembled, therefore, will not bind the corporation.⁹ Where, however, the resolution is duly passed, although not recorded, this is sufficient.¹⁰

§ 496. Implied Ratification.—An implied ratification by a corporation is usually, if not always, based upon conduct. The conduct may consist in acts or omissions to act, or it may be in both.¹¹ And so, in a case where an oral authorization would suffice, a ratification may be made by the acceptance or retention by the corporation of the benefit of the act, with knowledge thereof;¹² or it may be

7. *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024.

8. *Salfeld v. Sutter County etc. Co.*, 94 Cal. 546, 29 Pac. 1105.

9. *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

10. *Bay View Assn. v. Williams*, 50 Cal. 353. See *supra*, § 130.

11. *Martin v. Zellerbach*, 1 Cal. Unrep. 335. See for the general rules of implied ratification of an agent's acts, *AGENCY*, vol. 1, p. 770 et seq.

12. See Civ. Code, §§ 1589, 2310; *E. Aigeltinger, Inc., v. Burke*, 176 Cal. 621, 169 Pac. 373; *Pacific Vinegar etc. Works v. Smith*, 152 Cal. 507, 93 Pac. 85; *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Illinois Tr. etc. Bank v. Pac. Ry. Co.*, 117 Cal. 332, 49 Pac. 197; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162,

184 Pac. 964; *Beardon v. Richmond Land Co.*, 21 Cal. App. 357, 131 Pac. 894; *Blanck v. Commonwealth etc. Corp.*, 19 Cal. App. 720, 127 Pac. 805; *Hudson v. Seeley Specialties Co.*, 19 Cal. App. 213, 124 Pac. 1051; *Rich v. Edison Elec. Co.*, 18 Cal. App. 354, 123 Pac. 230; *Dickinson v. Zubiato Min. Co.*, 11 Cal. App. 656, 16 Pac. 123. See *Deane v. Gray Bros. etc. Co.*, 109 Cal. 433, 42 Pac. 443, holding that knowledge on the part of the corporation that plaintiff was rendering services to an injured person, and also knowledge that plaintiff was relying upon it for compensation for the performance of such services, taken in connection with the fact that the defendant, possessing such knowledge, made no objection thereto, were circumstances inadequate to create a legal liability against the corporation.

See note, 7 A. L. R. 1446, as to ratification by corporation of un-

implied from conduct,¹³ as from the use of the property involved in the disputed transaction,¹⁴ or from an acceptance of the goods purchased and payment for the same,¹⁵ or from a part payment of the obligation assumed,¹⁶ or from the making of a later instrument recognizing the one in dispute.¹⁷ So, too, long acquiescence in the transaction imports a ratification. And it has been held that the separate assent of the directors is sufficient in such circumstances to show acquiescence.¹⁸ Ratification may be pre-

authorized contract by acceptance and retention of benefits.

13. *Blood v. La Serena etc. Co.*, 134 Cal. 361, 66 Pac. 317 (acquiescence for five years); *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917 (demand by the corporation for fulfillment of the contract, or suit upon the contract); *Illinois Trust & Sav. Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197 (failure to object to the authority of the president to pledge bonds of the corporation within a reasonable time after knowledge of the corporation that the right of pledge was asserted by the pledgee held to be an acquiescence in and ratification of the president's assumption of authority); *Pope v. J. K. Armsby Co.*, 111 Cal. 159, 43 Pac. 589; *Bay View etc. Assn. v. Williams*, 50 Cal. 353 (where the president and trustees of a company had knowledge of expenditures and assented thereto); *Reardon v. Richmond Land Co.*, 21 Cal. App. 357, 131 Pac. 894 (failure to repudiate on learning of a contract made by the officer); *Riley v. Loma Vista Ranch Co.*, 1 Cal. App. 488, 82 Pac. 686 (failure to object upon inquiry of the other party as to rates).

14. *Shaver v. Bear River etc. Co.*, 10 Cal. 396; *Meister & Sons v.*

Wood-Tatum Co., 26 Cal. App. 584, 147 Pac. 981.

15. *Western Lithograph Co. v. Vanomar Producers*, 61 Cal. Dec. 425, 197 Pac. 103.

16. *California Nat. Supply Co. v. Flack*, 183 Cal. 124, 190 Pac. 634 (part payment on note); *Fraser v. San Francisco Bridge Co.*, 103 Cal. 79, 36 Pac. 1037 (part payment for medical services for injured employee); *Meister & Sons v. Wood-Tatum Co.*, 26 Cal. App. 584, 147 Pac. 981 (payment of installments on automobile); *Allen v. Central Counties Land Co.*, 21 Cal. App. 163, 131 Pac. 78 (payment of salaries); *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 123 Pac. 212 (payment of notes). But see *Massie v. Eldorado etc. Co.*, 36 Cal. App. 153, 171 Pac. 814, holding that a conditional determination to pay unauthorized obligations in the future is not ratification.

17. *Porter v. Lassen County etc. Co.*, 127 Cal. 261, 59 Pac. 563; *Ebner v. West Hollywood etc. Co.*, 30 Cal. App. Dec. 982, 187 Pac. 114; *Doerr v. Fandango Lbr. Co.*, 31 Cal. App. 318, 160 Pac. 406.

18. *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 Pac. 86; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817 (employment of

sumed from acts though not appearing of record.¹⁹ But where there is no benefit, ratification is not shown;²⁰ as, for instance, where the court finds that the work done and for which claim is made, is wholly worthless.¹

§ 497. Estoppel.—The doctrines of estoppel are similar to those of implied ratification and quite generally confused because of the similarity.² The acts by which a corporation may be estopped from disputing liability for unauthorized acts or by which ratification of authority to perform those acts may be established are the same.³ The general principle is that after having received and enjoyed or retained the benefits of a transaction, with knowledge, the corporation cannot repudiate liability and escape the burdens on the ground that it was not authorized,⁴ or that authority therefor was not set forth in its records.⁵ While there cannot be an implied ratifica-

physician in emergency); *Crowley v. Genesee Min. Co.*, 55 Cal. 273; *Countryman v. California T. Co.*, 35 Cal. App. 728, 170 Pac. 1029; *Leitch v. Marx*, 21 Cal. App. 208, 131 Pac. 328.

19. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

20. *Hamilton v. Bates*, 4 Cal. Unrep. 371, 35 Pac. 304.

1. *Thomasson v. Grace M. E. Church*, 113 Cal. 558, 45 Pac. 838.

2. See *supra*, § 494. See AGENCY, vol. 1, p. 731 et seq.

3. *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 460, 84 Pac. 321.

4. *Curtin v. Salmon River etc. Co.*, 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851; *Lawrence v. Johnson*, 131 Cal. 175, 63 Pac. 176; *Blood v. La Serena etc. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Streeten v. Robin-*

son, 102 Cal. 542, 36 Pac. 946; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Bank of Yolo v. Weaver*, 3 Cal. Unrep. 569, 31 Pac. 160; *Floyd v. Tierra Grande Dev. Co.*, 34 Cal. App. Dec. 707, 197 Pac. 684; *Butler v. Solano Land Co.*, 31 Cal. App. Dec. 509, 188 Pac. 1019; *Swartz v. Burr*, 43 Cal. App. 442, 185 Pac. 411; *Goodwin v. Central Broadway Bldg. Co.*, 21 Cal. App. 376, 131 Pac. 896; *L. Scatena & Co. v. Van Loben Sels*, 19 Cal. App. 423, 126 Pac. 187; *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 9, 124 Pac. 875; *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 873, 105 Pac. 130; *Tilden v. Goldy Machine Co.*, 9 Cal. App. 9, 98 Pac. 39; *Jones v. Evans*, 6 Cal. App. 88, 91 Pac. 532; *Northwestern Pkg. Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981. And see *supra*, § 496, as to such acts amounting to a ratification.

5. *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 460, 84 Pac. 321.

tion in such a case,⁶ since where the original authority is required to be in writing⁷ it is obvious that mere conduct cannot suffice for the purpose, there may nevertheless be an estoppel rendering the corporation liable.⁸ But where there is no acceptance of any benefit there can be no estoppel on that ground.⁹ The doctrine of estoppel, therefore, is applicable to executed contracts, not executory contracts.¹⁰

Execution of Instruments.

§ 498. In General.—It is not necessary, of course, for all contracts of a corporation to be in writing. A provision of the by-laws that no contract shall be binding upon the corporation unless made in writing is applicable only to executory contracts and does not exempt the corporation from all liability in all cases founded upon a contract not in writing.¹¹ And a corporation whose internal policy requires its contracts to be executed in a certain manner may by acquiescence become liable upon contracts made by its agents in some other manner.¹² But where

6. See *supra*, § 496.

7. See Civ. Code, § 2310, and *supra*, § 495.

8. *McCartney v. Clover Valley etc. Co.*, 232 Fed. 697, 1 A. L. R. 1127, 146 C. C. A. 623.

9. *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494; *Goodell v. Verdugo etc. Co.*, 138 Cal. 308, 71 Pac. 354; *Bliss v. Kaweah etc. Co.*, 65 Cal. 502, 4 Pac. 507; *Northwestern Pkg. Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981.

10. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Foulke v. San Diego etc. Co.*, 51 Cal. 365; *Pixley v. W. P. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623. See ESTOPPEL.

11. *Foulke v. San Diego etc. R. Co.*, 51 Cal. 365; *Pixley v. Western*

Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

Where the by-laws provide that it is the duty of the president to sign all contracts and other instruments in writing first approved by the board of directors, such by-law does not limit his power with respect to oral contracts. *E. W. McLellan Co. v. East San Mateo L. Co.*, 166 Cal. 736, 137 Pac. 1145; *Freyberg v. Los Angeles Brewing Co.*, 4 Cal. App. 403, 88 Pac. 378.

12. *Illinois Tr. & Sav. Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

A by-law which provides that notes and obligations signed by the president and secretary shall be binding on the corporation does not

by resolution the president and secretary are authorized to execute contracts, the president alone cannot make a contract under such authorization.¹³ Instruments signed by an officer in the name of the corporation, without authority, do not, of course, bind the corporation,¹⁴ although if the corporate seal is affixed, authority will be presumed.¹⁵

To impose on a plaintiff the burden of proving that the execution of a corporate instrument sued on was authorized by the corporation, the answer should deny the genuineness and due execution of it, otherwise it is deemed admitted.¹⁶ And where the due execution of an instrument is admitted by the pleadings, an objection to its admission in evidence is properly overruled.¹⁷ By failing to answer, the note or other instrument sued on is thereby admitted to be a corporate obligation.¹⁸

§ 499. Liability of Unauthorized Officer.—The code provides that one who assumes to act as an agent thereby warrants to all who deal with him in that capacity that he has the authority which he assumes;¹⁹ and it further

require the secretary to sign all notes and obligations. *McCormick v. Stockton etc. R. Co.*, 130 Cal. 100, 62 Pac. 267. See *Hawley v. Gray Bros. etc. Co.*, 106 Cal. 337, 39 Pac. 609, where the corporation was held bound by the act of the president in presenting to the owner of premises about to be leased to the company, a certified copy of a resolution ratifying and confirming the officer's acts in making the lease, although no such resolution appeared on the minutes.

13. *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494. See as to president's authority, ante, p. 1101.

14. *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75.

15. See supra, § 95.

Where a note as first executed did not mention the corporate name, it is the obligation of the corporation nevertheless if by authority of the board of directors the name and seal of the corporation are later affixed. *San Joaquin Valley Bank v. Gate City Oil Co.*, 170 Cal. 250, 149 Pac. 557.

16. *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1. See Code Civ. Proc., § 447, for the same rule; and see generally, PLEADING.

17. *Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203.

18. *Shaver v. Ocean Min. Co.*, 21 Cal. 45.

19. Civ. Code, § 2342.

prescribes the conditions under which one is responsible to third persons as a principal for his acts in the course of his agency,²⁰ and the rule of damages for the breach of such warranty.¹ In view of the provisions of these sections of the Civil Code, it has been held that the secretary and general manager of a corporation is personally liable to a real estate broker for the reasonable value of services rendered under a contract entered into by the officer in the name of the corporation, where such official assumed to act as agent of the corporation and entered into the contract in its name without believing, in good faith, that he had authority to do so.² And similarly, in a case where the president of a corporation procured the services of the plaintiff in obtaining a satisfactory lease of a part of the corporation's realty, and where, in a suit against the company for payment for his services, the authority of the president to act as the company's agent in making the contract with the plaintiff was denied and he was nonsuited, it was held, in an action subsequently brought against the president of the corporation, that he was liable personally for a breach of warranty of authority.³ The liability in such cases is upon the breach of warranty of authority and not on the instrument executed for the corporation by the unauthorized officer.⁴

§ 500. Personal Liability of Officer.—It is a general rule that when an officer of a corporation signs his own name only to an instrument without referring to any

20. Civ. Code, § 2342. See AGENCY, vol. 1, p. 816 et seq.

1. Civ. Code, § 3318. See *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64, for the rule prior to the adoption of the codes.

2. *Borton v. Barnes*, 32 Cal. App. Dec. 876, 192 Pac. 307.

3. *Kohlberg v. Havens*, 41 Cal. App. 222, 182 Pac. 467.

4. *Bean v. Pioneer Min. Co.*, 66

Cal. 451, 56 Am. Rep. 106, 6 Pac. 86 (holding that if it was known to the payee that a note was given by the maker as officer of the corporation for a corporate indebtedness, the latter is not bound on the note, even though he had no power to execute it for the company); *Blanchard v. Kaull*, 44 Cal. 440; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec.

principal, he will be held personally bound, although he is known to be or avowedly acts as agent.⁵ And where he makes a contract which purports to be his promise and to bind himself alone, and he has not in fact any authority to make the particular contract for the company, he will be personally bound by the contract, notwithstanding his lack of personal interest in the consideration.^{5a} But if upon the whole instrument it can be collected that the true object and intent of it is to bind the corporation and not the officer as an individual, the courts will adopt such construction of it, however informally it may be expressed.⁶ The essential thing is for the instrument to show that the officer means only to contract for his principal.⁷

If, therefore, an officer or agent of a corporation in executing a contract employs terms which in legal effect charge him, he may be sued upon the instrument itself as a contracting party; and this is so because by the use of such terms he has made the contract his own; but if it

5. *Kerry v. Pacific Marine Supply Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320; *San Bernardino Nat. Bank v. Andreason*, 3 Cal. Unrep. 771, 32 Pac. 168. See *Hay v. McDonald*, 21 Cal. App. 204, 131 Pac. 74, where corporate name was not mentioned and the officer was held personally. And see cases cited in applications of rule, *infra*, § 501. See for general rules of agency in this respect *AGENCY*, vol. 1, p. 831 et seq.

5a. *Hall v. Jameson*, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N. S.) 1190, 91 Pac. 518.

6. *E. W. McLellan Co. v. East San Mateo L. Co.*, 166 Cal. 736, 137 Pac. 1145 (applying the general principle though not expressing it in terms); *Kerry v. Pacific Marine Supply Co.*, 121 Cal. 564, 66 Am. St.

Rep. 65, 54 Pac. 89; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 604; *Love v. Sierra etc. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Baden Brick Co. v. Chubbuck*, 7 Cal. App. 725, 95 Pac. 905 (where the instrument was signed by the president personally, but it was held that this fact did not render the evidence insufficient to sustain a finding that the contract was with the corporation). And see cases cited in applications of rule, *infra*, § 501.

7. *Haskell v. Cornish*, 13 Cal. 45 (where it appeared that the trustees made the contract as such for the corporation). See *Civ. Code*, § 3101, as to when and under what circumstances agent is personally liable. And see *AGENCY*, vol. 1, p. 819 et seq.

does not contain such terms, he cannot be sued on the instrument itself, for the contract is not his. Thus, where a note reads "A Co. promise to pay, etc.," and is signed "B, president," and "C, secretary," the officers are not personally liable thereon.⁸ And this is so even though the officers are unauthorized.⁹ Where a note is signed not only by an officer or officers but also "personally," the first signature is for the corporation while the second binds the officer or officers personally.¹⁰ And where a note is joint in form, executed by a corporation and certain of the stockholders as individuals, it is the joint note of the corporation and the individuals whose names are signed thereto.¹¹ Where the word "president" is added to the name, although the words "we promise to pay" appear, without the corporate name appearing, the officer is personally liable.¹² If, however, it is known to the payee that the note is given by the signer as an officer of the corporation and in recognition of an indebtedness of the company, the signer is not bound on the note, even though he has no power to execute it for the company.¹³

§ 501. Specific Application of Rules.—Where an instrument is signed by one with the addition of the word

8. *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64.

9. *Blanchard v. Kaull*, 44 Cal. 440.

10. *McCormick v. Stockton etc. B. Co.*, 130 Cal. 100, 62 Pac. 267.

11. *Savings Bank v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273, holding that the signatures of the officers are representative of the corporation only; that they are not personally bound; and that the designation of word "stockholders" in such a note is immaterial.

12. *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320; *San Bernardino Nat. Bank v. Andreason*, 3 Cal. Unrep. 771, 32 Pac. 168.

Where the officer is liable on the contract individually, it is of no concern to him that the court also finds the corporation liable. *Dunaway v. Anderson*, 22 Cal. App. 691, 136 Pac. 309.

13. *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86, holding that while an individual is prima facie liable personally on a note executed by him as an officer of a named corporation, he may rebut the presumption as between himself and the payee by proof that the note was given as agent of the company with the payee's knowledge of the fact.

"president" to his signature, without any mention of the corporation, this will not make the contract the obligation of the corporation,¹⁴ for the word "president" in such case is mere *descriptio personae*.¹⁵ The fact that the corporate seal was attached does not necessarily make the note that of the corporation or relieve the officer of his personal liability.¹⁶ But where the corporation is not mentioned in the body of the note, yet the note is signed by one as president of a named corporation and then again "personally," this clearly shows that the first signature is for the corporation and the second personally.¹⁷ And where the contract on its face purports to be that of the corporation, of which the one executing it is expressly stated to be president and manager, his signature is sufficient to bind the corporation.¹⁸ So, also, where a note is signed by one as president of a named corporation and by one as secretary pro tem and indorsed by the president and others, the individual indorsement is readily understood when the note is viewed as the principal obligation of the corporation, whereas it would be unusual if viewed as an individual obligation of the officers, hence read as a whole it would appear from the face of such note that it is the corporate note indorsed by individuals.¹⁹ On the principle that an

14. *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320; *Chamberlain v. Pacific Wool-Growing Co.*, 54 Cal. 103 (where the note was unauthorized by the corporation); *Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 1082 (promise made in the first person singular); *Hay v. McDonald*, 21 Cal. App. 204, 131 Pac. 74.

15. *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320. See *AGENCY*, vol. 1, p. 822.

16. *San Bernardino Nat. Bank v. Andreason*, 3 Cal. Unrep. 771, 32 Pac. 168 (where the note read, "we promise to pay").

17. *McCormick v. Stockton etc. R. Co.*, 130 Cal. 100, 62 Pac. 267.

18. *Schuyler v. Pantages*, 36 Cal. App. Dec. 5, 201 Pac. 137 (where the individual did business under the name of the corporation).

19. *Farmers & Mechanics' Bank v. Colby*, 64 Cal. 352, 28 Pac. 118.

The signature of the corporation by one as president and one as secretary is not the personal signature of the officers; but persons who also sign as stockholders do not sign in a representative capacity and their designation as stockholders is immaterial as relieving them of personal liability; *Savings Bank v. Central*

agent must disclose his agency, in order to escape liability as a principal, it has been held in a case where a charter-party was signed by a corporation which described itself in the body of the instrument as managing owner of the vessel, but without disclosing the identity of the other parties represented by it as agent, or their interest in the vessel, that, in assuming to act for them as agent in the execution of the instrument, it was personally liable thereon as principal for any breach of the contract on its part.²⁰

§ 502. Promise in Corporate Name.—If a note is signed only by the corporation, it has been pointed out that a mistake might easily be made which would make the collective company the nominative—"we promise to pay"—instead of the corporate name. If the note is signed in the corporate name "by" the officer with his official designation, and that officer has power to execute such instruments, it is the note of the corporation, notwithstanding the words "we promise." The omission of the words "by" or "per" does not render the note that of the individual officer.¹ In a case where a note was signed by officers as president and secretary, respectively, and the note read "we promise to pay," it was stated by the court that it was possible for such a note to be that of the corporation, and hence it was held that there was no error in a default decree in such a case, it being expressly averred in the complaint that the corporation made the note in this way.²

§ 503. Signature of Directors or Trustees — Stockholders.—If an instrument is signed, not by the corpora-

Market Co., 122 Cal. 28, 54 Pac. 273.

20. *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89. See AGENCY, vol. 1, p. 854 et seq., as to liability of agent acting for an undisclosed principal.

1. *Bean v. Pioneer Min. Co.*, 66

Cal. 451, 56 Am. Rep. 106, 6 Pac. 86. See *Kerry v. Pacific Marine Supply Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89, where the signature was in the corporate name, omitting the words "by" or "per."

2. *Rowe v. Table Mt. Water Co.*,

10 Cal. 441.

tion, but by the individual directors, it does not bind the corporation at law, although it may be asserted against it in equity.³ On its face such a contract is the individual contract of the parties, even though they are described as directors of the company.⁴ And where directors sign a bond individually, the corporation being nowhere mentioned and there being nothing to designate it, as a party to be bound, the individual directors are liable—not the corporation.⁵ Where, however, notes are made by individuals as trustees of the corporation, they are not the personal obligations of the trustees.⁶ Likewise, where the promise to pay in the body of a note is in the corporate name—"O. M. Co. promise to pay"—and the note is executed by individuals as trustees, the note itself shows that it was not their intention to bind themselves personally.⁷ It has been held that although the evidence may be sufficient to justify the court in concluding that by the use of the words "as stockholder" a person wished to show that he did not intend to be bound personally, that, however, is a matter to be determined by parol testimony.⁸

§ 504. Parol Evidence.—Under the rule that parol evidence may be employed to charge an undisclosed principal or one whose liability is in doubt,⁹ where the instrument on its face purports to be the act of the corporation, but is signed, not by the corporation, but by a stranger, it is competent to establish by parol testimony the fact as to

3. *Love v. Sierra etc. Co.*, 32 Cal. 639, 91 Am. Dec. 602.

4. *Whiting v. Heslep*, 4 Cal. 327.

5. *Richardson v. Scott River etc. Co.*, 22 Cal. 150.

6. *Blanchard v. Kaull*, 44 Cal. 440; *Haskell v. Cornish*, 13 Cal. 45.

7. *Shaver v. Ocean Min. Co.*, 21 Cal. 45.

8. *Lynch v. McDonald*, 155 Cal.

704, 102 Pac. 918. See *infra*, § 504, as to parol evidence.

9. *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650 (holding that even where the contract bears no suggestion on its face, the rule now generally received is that parol evidence is competent either in favor of or against the corporation). See *AGENCY*, vol. 1, p. 857.

whether the contract is that of the corporation;¹⁰ and likewise, parol evidence is competent to show whom the parties intend should be bound or benefited.¹¹ So, by evidence it may be shown that one signing "as stockholder" by the use of such words wished to show that he did not intend to be bound personally.¹² But such evidence is not competent for the purposes of exonerating the signer from personal liability,¹³ unless there is evidence that the signer was duly authorized to contract for the corporation and that credit was actually given to the corporation alone.¹⁴

10. *Pacific Imp. Co. v. Jones*, 164 Cal. 260, 128 Pac. 404.

11. *Pacific Imp. Co. v. Jones*, 164 Cal. 260, 128 Pac. 404; *Escondido Oil etc. Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040; *McCormick v. Stockton etc. R. Co.*, 130 Cal. 100, 62 Pac. 267; *Southern Pacific Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650; *Swartz v. Burr*, 43 Cal. App. 442, 185 Pac. 411; *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86; *Hay v. McDonald*, 33 Cal. App. 572, 165 Pac. 1030; *Hay v. McDonald*, 21 Cal. App. 204, 131 Pac. 74.

The fact that an officer uses the stationery of the corporation does not carry with it any presumption

and is not evidence that the contract was made by the corporation. *Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 1082 (where there was also evidence that the officer regarded the obligation as his individual obligation); *Hay v. McDonald*, 21 Cal. App. 204, 131 Pac. 74.

12. *Lynch v. McDonald*, 155 Cal. 704, 102 Pac. 918.

13. *Southern Pacific Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650; *Hay v. McDonald*, 33 Cal. App. 572, 165 Pac. 1030. See AGENCY, vol. 1, p. 821 et seq.

14. *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86. See also Civ. Code, § 3101.

(E. W. D.)

(The article Corporations is concluded in vol. 7.)

INDEX.

[The numbers in this Index refer to pages]

CONTRACTS

Abandonment
 as breach, 458
 see Rescission
 Abbreviations, 289
 Absurdity rejected, 276
 Acceptance
 as waiver, 432
 ignorance of contents, 84
 see Consent; Offers
 Accord and satisfaction, part payment, 185, 186
 Account stated, executory contract, 26
 Actions,
 amendments, 491
 bond of contractor, 495
 breach of contract, 463
 contracts not to sue, public policy, 119
 counterclaim, 489
 cross-complaint, 489
 defenses, 486
 breach as, 488
 definiteness essential to suit, 216
 evidence, 492
 findings, 494
 misjoinder or nonjoinder of parties, 476
 mutuality created, 213
 parties plaintiff, 468
 defendant, 475
 pleading and proof by plaintiff, 479
 remedies for breach, 463
 statement of contract, 477
 third person, contract for benefit of, 469
 uncertainty, degree of as affecting remedy, 220
 variance, 484
 Act of God, excuse for nonperformance, 441
 Adoption, 93
 Age of parties, 73
 Agency, ratification, 31
 Agent,
 modification by, 374
 representative capacity, 339
 signature by, 231

CONTRACTS—Continued

Agreement, definition, 15, 16
 Agreements as contracts, 19
 Alienation, restraint of, see Legality
 Alteration, see Modification
 Alternative stipulations, performance, 398
 Ambiguities, interpretation, 277
 Annexed matters, consideration of, 320
 Anticipatory breach, 457
 Approval by third person, 419
 Arbitration, ousting jurisdiction of court, 130
 Assent, see Consent
 Assignment, burden of obligation, 41
 of wages, 123
 Assumpsit, see Implied Contracts
 Attorney and client, confidential relations, 75
 Attorneys, agreement to influence legislation, 124-126.
 Basis of obligation, 18
 Bidding, public policy, 113
 Bilateral contracts, 63
 Bill of lading as contract, 17
 Blanks, filling, 227
 Bond of contractor, 243, 333
 action on, 495
 Bonds, interpretation, 248
 proposal and offer to issue, 26
 Breach, 450
 act or omission constituting, 450
 actions for breach, see Actions
 anticipatory breach, 457
 bond of contractor, 495
 dealings, statement of contract, 477
 declaration of intention, 459
 defenses, 486-489
 definition, 450
 divisible contract, 450, 451
 entire contract, 450
 evidence, 492
 findings as to, 494
 first violation, 451
 fraud as breach, 451
 injunction as remedy, 466

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Breach—Continued
 jury, question for, 452
 part of contract, 450
 parties, defendant, 475
 misjoinder or nonjoinder, 476
 plaintiff, 468
 place of breach, 452
 pleading, 489, 491
 by plaintiff, 479
 prevention of performance,
 building and construction
 contracts, 455-457
 proof by plaintiff, 479
 remedies in general, 463
 renunciation by party, 458
 repudiation, 458-461
 contract fully performed on
 one side, 461
 rescission for, 392-395
 restraint of trade, contracts in,
 453
 enjoining breach, 453, 454
 severable contract, 450
 specific articles, contract to pay
 in, 467
 spirit and letter of contract,
 451
 third person, contract for bene-
 fit of, 469-473
 enforcement of contract for
 benefit of, 474
 intent to benefit, 473
 variance, 484
 waiver of breach, 462
Brokers, public policy, 114
Building contracts, bond, 243
 breach of contract, 455
 hours of labor, 246
Building contracts, see Interpretation; Recording
Business, see Restraint of Trade
Capacity, see Parties
Carriers, relief from liability, 117
Certainty, see Definiteness
Chattel mortgages, interpretation, 247
Circumstances, consideration of, 294
Civil law, 13-15
Codification of law, 14
Coercion, see Duress; Menace
Conduct, construction by, 304
**Collateral agreements, considera-
 tion of, 265**
Common and civil law, 13, 14
 codes silent, 14
 interpretation, rules of, 248
Communication of consent, 46

CONTRACTS—Continued

**Community property, contracts be-
 tween husband and wife, 37,
 38**
Compensation, amount or rate, 369
 extra work, 370
 right to, 368
**Completion of work by owner,
 428**
Compromise, see Consideration
Concurrent conditions, 366
Conditions, concurrent, 366
 expressed, 361
 forfeiture, condition involving,
 362
 implied, 361
 nature and effect, 360
 obligations to perform, 396
 performance of, 399
 precedent, 363
 subsequent, 367
Conditional offers, 407
Confidential relations, 79
 application of rules, 74
 brother and sister, 74
 burden of proof, fraud, 69
 husband and wife, 76
 meaning of, 74
 persons standing in, 75
 presumption, 72
 proof of injury, 73
Confirmation, 93, 94
**Conflict of laws, see Law Govern-
 ing**
**Consensual contracts, see Implied
 Contracts**
Consent, 41
 acceptance of offers, see **Offers
 and Proposals**
 agreement on same thing, 44
 to be reduced to writing, 58
 to contract, 45
 apparent, 42
 assent of two minds, 41
 bilateral contracts, 63
 code requirements, 42
 coercion, 43
 communication of, 46
 acceptance, 57
 conduct signifying, 59
 confidential relations, 72, 74
 confirmation, 93
 duress, 42, 65
 resort to process, 67
 elements of consent, 47
 essentials, 41
 estoppels, 58
 fraud, 42, 68
 freedom of, 42

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Consent—Continued
 guaranty contracts, 46
 husband and wife, 75
 implication of agreement, 45
 mail, consent by, 57
 manifesting to strangers, 46
 manner of assenting, 57
 menace, 42, 65
 mental condition, 71
 weakness, 71, 73
 minds, meeting of, 44
 mistake, 42
 see Mistake
 mode of acceptance, 57
 mutuality, 43
 necessity, 41
 negotiations opened, 45
 offer, see Offers
 options, see Options
 parties ad idem, 45
 party not obligated, 42
 preliminary negotiations, 44
 proposal and acceptance, 47
 proposals, see Options
 ratification, 93
 by subsequent consent, 49
 reality, 43, 65
 relatives, dealing between, 74
 remedy for lack of consent, 77
 rescission, 43
 sufficiency, 41, 61
 telegram, consent by, 57
 terms to be embraced, 45
 uncertainty in one particular,
 46
 undisposed intention, 46
 undue influence, 42, 70
 remedy, 77
 unilateral contracts, 63
 void and voidable, 43
 writing, agreement to be re-
 duced to, 58
Consideration, 163
 acceptance of offer, 163
 accord and satisfaction, part
 payment, 185, 186
 account, recital of, 199
 action, compromise of, 177
 forbearance to sue, 173
 additional compensation, com-
 promise, 180
 adequacy of amount, 189
 recital, 196
 sealed instrument, 204
 specific performance, 190
 alteration of agreement, 373
 of contract, 373

CONTRACTS—Continued

Consideration—Continued
 amount, adequacy of, 189
 leaving to third party, 197
 specification of, 196
 article without value, 163
 ascertainment, 196
 exclusive method, 197
 assignment of right, 168
 bad, see Legality
 bank assets impaired, note of
 directors, 170
 benefit to promisor, 168
 past, 183
 boundary, location of, 168
 cancellation of debt, 172
 claim, surrender of, 172
 code definition, 165
 compensation increased, 180
 compounding crimes, 174, 175
 compromise, 163
 of action, 177
 of claim, 175
 legal proceedings, 177
 condition or covenant, 198
 creditors' engagements with
 debtor, 188
 criminal proceedings, compro-
 mise, 192
 prosecution, forbearance, 174
 declaration of instrument, 168
 definition, 163, 165
 delay, agreement for, 173
 detriment suffered, 163
 past detriment, 183
 performance of legal obliga-
 tion, 179
 to promisee, 168
 disclaimer, 163
 doubtful right, compromise, 176
 indorsement of contract, 186
 burden of showing want, 202
 evidence to show, 198
 failure of consideration, 207
 parol, 198
 presumption, instrument in
 writing, 200
 rebuttal of presumption, 202
 recitals in agreement, 196-
 199
 sealed instrument, 204
 want or failure of consider-
 ation, 207
 weight of, 203
 executed or executory, 166, 183
 execution impossible, 196, 197
 executory, promise for promise,
 187

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Consideration—Continued
 executory contract, legal consideration, 195, 196
 existing agreement, 185
 supplementing or modifying, 185
 existing debt, promise to pay, 184
 expression of, 196
 extension of time, 163
 extrinsic evidence, 198
 failure, denials, 210
 evidence, 207
 executory contracts, 208
 pleading, 209
 estoppel, 210
 rescission, effect of, 209
 right to show, 207
 showing, 207
 forbearance, 171
 criminal prosecution, 174
 future contracts, 174
 to sue, 173
 fraud, adequacy of amount, 189
 future contracts, covenants not to sue, 174
 good, 165
 honor, or gratitude, promise founded on, 182
 illegal, 190
 illegality in contract, 96
 immoral, 192
 implication, 196
 importation of, 205
 by instrument, 200
 increased compensation, 180
 indemnity contract, 186
 information, 169
 kinds, 164
 lawfulness, 190, 191, 192
 lease, moral obligation, 182
 legal obligation, performance of, 179
 legality, 190
 bank loans, 192
 criminal proceedings pending, 192
 executed contract, 195
 illicit cohabitation, 192
 immoral relations, 194
 liquor, illegal sale, 194
 locus poenitentiae, 193
 partial legality, 194
 pleading, 193
 subsequent consideration, 192
 trustee, resignation of, 193
 wages, 193

CONTRACTS—Continued

Consideration—Continued
 lienholders, forbearance to foreclose, 174
 limitations, moral obligation, 181
 litigation compromise, 177
 loan secured, 170
 manufacturing, increased compensation, 181
 marriage, 168
 minds, meeting of, 173
 modification of contract, 378
 prior agreement, 185
 moral obligation, 181
 motive, 163
 mutual promises, 187
 mutuality, 211
 nature, 163
 necessity, 166
 nudum pactum, 163, 166
 obligation, extinguishment of, 172
 option, declaration of exercise, 172
 oral promise, 167
 parent, support of child, 180
 parol evidence, 198
 partial illegality, 194
 part payment of debt, 179
 agreement to accept, 185
 part performance, 185, 186
 parts, entire contract, 164
 past benefit or detriment, 183
 payment of existing debt, 183, 184
 payment less than due, 179, 180
 performance of legal obligation, 179
 pleading, 200, 205, 206
 sealed instrument, 204
 want or failure, 209
 prejudice suffered, 170
 alone sufficient, 171
 presumption, 196
 disputable, 202
 instrument in writing, 200
 rebuttable, 202
 sealed instrument, 204
 truth of facts, recital, 197
 prices, adequacy, 190
 inadequacy, 189
 prior agreement, supplementing or modifying, 185
 promise for a promise, 187
 mutuality, 211
 proof, see Evidence
 public policy, legality, 190
 quantum, 169

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Consideration—Continued
 ratification of contract by retaining, 94
 reasonableness, 197
 recital, 196
 account stated, 199
 conclusiveness, 197
 contradiction, 199
 evidence, 198, 199
 looking beyond instrument, 198
 prima facie evidence, 199
 showing true consideration, 197
 statute of frauds, 197
 release, 163
 mutual, 175
 relinquishment of right, 171
 renewal of note, 164
 repetition of promise, 164
 rescission for failure of, 391, 392
 right, relinquishment of, 171
 sealed instrument, 204
 presumption, 200, 201
 security, waiver of, 172
 separation of good from bad, 194, 195
 services, past benefit, 183, 184
 settlement of disputes, see Compromise
 specification of amount, 196
 statute of frauds, recital, 197
 stipulation in action, 168
 subscription agreements, 188
 subsequent agreement, cancellation of, 172
 sufficiency, 167
 supplementing prior agreement, 185
 surety, party becoming, 169
 surrender of right, 171
 third party, consideration moving to, 171
 time, extension of, 173
 truth of recitals, 197
 unilateral contracts, 163, 164
 valuable, 165
 voidable contracts, 29
 waiver of right, 171
 want of, burden of showing, 202, 203
 see Failure
 will, agreement to make, 188
 waiver of right to contest, 171
 written instrument, presumption, 200

CONTRACTS—Continued

Construction of contracts, see Interpretation
 Constructive contracts, 21
 Contemporaneous agreements, interpretation, 265
 exposition, 305
 Contractor's bond, action on, 495
 Corporations, power to contract, 38
 stockholder's liability, nature, 25
 Counterclaim, 489
 Courts, contracts affecting administration of justice, 130
 functions of, 326, 328
 ousting jurisdiction, 130
 Criminal law, public policy as to contracts, 118
 prosecution, see Consideration
 Custom, see Usage and Custom
 Damages, contracts for liquidated, 47
 Death as excuse for nonperformance, 448
 Default, rescission for, 392
 Defenses in action for breach, 486
 breach as, 488
 Definiteness, 215
 action, right to bring, 215
 certainty, necessity of, 215
 circumstances considered, 216
 conjecture, 216
 enforcement, when refused, 216
 evidence, extrinsic, 217
 hopelessly uncertain, 211
 intent, definiteness or certainty, 216
 interpretation, 216
 meeting of minds, 215
 necessity of, 215
 practical construction, 217
 price, 215, 218
 public improvement, specification of, 221
 quantity, 218
 remedy, degree of uncertainty as affecting, 220
 sales, 218, 219, 220
 services, agreement for, 219
 support, contract for, 217
 termination, 218
 time of duration, 218
 vagueness, 216
 void for want of, 216
 water for irrigation, 217
 wills, option, 217
 Definitions, 15

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Delivery, 235
 acts included in, 235
 contract taking effect on, 236
 deposits in mails, 237
 elements of, 236
 execution by, 235
 place, 236
 retention of contract, 237
 understanding of as to, 238
 "written instrument," 235
Demand, performance, demand for, 403
Description of parties, 39
Destruction of building in course of erection, 426, 445
 building being repaired, 445
 subject matter, 443
Divorce, contracts concerning, 37
Duplicate contracts, 230
Duress, 65
 see Rescission
 coercion and intimidation, 67
 financial embarrassment, 67
 goods, duress of, 67
 confinement or detention, 66
 consent to be free, 42
 criminal process, 67
 meaning of, 65
 mental condition of parties, 71
 moral duress, 66
 process, resort to, 67
 threats, 66, 67, 68
 unlawful, 66
Election, alternative stipulations, 398
Enforcement, consent necessary, 42
 see Actions
Entire and severable contracts, 322
 interpretation, 322
Entire contract, breach of, 450
 construction of, 258
Equity, see Mistake
Essentials of contracts, 19
Estoppel to deny, 94
 ratification of contract, 94
Evidence, breach of contract, evidence in action for, 492
 consideration, evidence as to, see Consideration
 definiteness or certainty, 216
 execution of contract, 238, 239
 extrinsic, 302
 aid to interpretation, 249, 250
 several instruments to be construed, 302
 incomplete writing, 227, 228

CONTRACTS—Continued

Evidence—Continued
 interpretation, evidence to aid, see Interpretation
 mistake, 83, 84, 92
 intention, 93
 procuring evidence, contracts for, 131
 railroad ticket, parol evidence, 17
 suppressing evidence, contracts for, 132
 variance, 484
Exchange of property, mutuality, 212
Excuse for nonperformance, 433
Execution,
 delivery, 235
 duplicates, 230
 evidence as to, 238, 239
 "executed," meaning of, 228
 place of, 229
 pleading of execution, 238
 proof of, 238
 sealing, 228
 seals, 234
 signature, 230
 signing and delivering, 228, 229
 stamps, 230
 subscribing, 228
Executory, see Consideration
Executory and executed, 26
 definiteness and distinctions, 26, 27
 extension of time, 27
 forbearance to sue, 27
 performance, 27
 sales, 27
Express and implied, 20
 proof of, 20
Extra work, 370
Extrinsic evidence to make certain, 217
Ex turpi causa, see Legality
Failure of consideration, see Consideration
Fiduciary capacity, 114
Figures, 283
Filing, bonds of contractors, 243-246
 building contracts, 240, 243
 effect of want of, 223
Filling blanks, 227
Findings in action for breach, 494
Foreign law, 314
Form as element, 222
Formal requisites, 222
Fraud, see Confidential Relations; Rescission

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Fraud—Continued

- actual or constructive, 69
- breach, fraud as, 451
- burden of proof, 69
- confidential relations, 72
- consent to contract, 68, 69
 - to be free, 42
- ignorance of contents of instrument, 85
- intendments against, 269
- mistake, 79
 - misrepresentation of law, 91
 - public policy, 113
- ratification of contracts, 94, 95
- relation to contract, 69
- statute of, see Writing
- undue influence, 70
- voidable contracts, 29, 30

Freedom of consent, 42

Future, contract to be made in, 45

Gift as contract, 16

Goodwill, sale of, 139

Government, party to contracts, 38

Government contracts, 31

public policy, 113

Grants, interpretation, 247

Guaranty, communication of consent, 46

interpretation, 248

Guardian and ward, confidential relations, 75

Historical account, 13

Hours of labor, stipulation as to, 246

Husband and wife, capacity, 36

community property, 37, 38

confidential relations, 75, 76

public policy as to agreement between, 116

Identification of parties, 39

determination, 40

Ignorance of contents, 84

of legal rights, mistake, 82

Illegal consideration, see Consideration

contract, see Legality

void contract distinguished, 29

Immoral relations, see Consideration

Immorality, contracts promoting, 124

Implied contracts, 20

acknowledgment of debt, 21

consensual in nature, 20

express contracts distinguished, 20, 21

CONTRACTS—Continued

Implied contracts—Continued

- fence division, 25
- implied in law, 21
- municipal contracts, 24
- quasi contracts, 21
- services as basis of, 23
- statutory obligation, 24

Implied promise, 22

Impossibility of performance, 439

Incomplete instruments, 227

Indefiniteness, see Definiteness

Indemnity, consideration, 186

Infants, see Minors

Injunction as remedy for breach, 466

Insane persons, capacity to contract, 32

Insurance, agreement for, 428

interpretation, 248

parol contract, 225

entire contract considered, 258

interpretation, rules of, 248, 252

unlawful intent, 100

writing controls, 274

Intention to make contract, 42

undisclosed, 46

Interpretation, 247

abbreviations, 289

absurdity, 259, 276, 279

ambiguities, 277

extrinsic evidence, 278

latent, 278

annexed matters, 320

apportionment of contracts, 321-325

blanks, printed, 284

bond of contractor, 333

building contracts, 319, 325, 331

compensation, 368

contractor's bond, 333

contractor's responsibility, 332

extra work, 370

time of performance, 344

business, carrying on rival, 336

certainty, contract of sale for uncertainty, 216

circumstances surrounding, 279, 294

code rules, 247

collateral or contemporaneous agreements, 265

common-law rules, 248

compensation, amount or rate, 369, 370

extra work, 370

right to, 368

conditions, 360

concurrent, 366

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Interpretation—Continued

conditions,
 embraced in contract, 361
 forfeiture involved, 362
 implied, 361
 nature and effect of, 360
 precedent, 363
 subsequent, 367
 conduct of parties, 304, 306
 conflicting clauses, 280
 construction contracts, 331
 contemporaneous exposition, 305
 courts, appellate review, 327
 conflicting evidence, 327
 functions of, 326
 matter for trial court, 327
 relative functions of court
 and jury, 328
 custom as part of, 315
 expressed provisions of law,
 317
 deed and mortgage, 257
 definiteness, 216
 definitions, *see words and*
 phrases, infra
 description of instrument, 256
 designation of contract, 256
 divisibility, 322, 323
 doubtful contracts, 278
 each clause, 259
 entire agreement, how question
 determined, 268
 entire body of contract, 257,
 258
 entire and severable, 322
 every part given effect, 259
 evidence to aid, 249
 abbreviations, meaning, 289
 ambiguities, 277
 patent, 279
 collateral agreements, 265
 completeness or incompleteness
 of contract, 267
 conflicting, 327
 contemporaneous agreements,
 265
 contradicting terms, 251
 controversy with strangers,
 251
 conversations and prior nego-
 tiations, 265, 279
 declarations of party, 265
 extrinsic, 263, 294-298
 ambiguity, 278
 surrounding circumstances,
 294-298
 intention of parties, 250
 lost contract, 252

CONTRACTS—Continued

Interpretation—Continued

evidence to aid
 oral testimony, 249
 promisee's understanding, 309
 purpose of agreement, 264,
 265
 sense in which terms were
 used, 265
 subsequent dealings, 265
 surrounding circumstances,
 250, 294-298
 terms other than in writing,
 263
 words, meaning of, 286
 extrinsic evidence, *see evi-*
 dence to aid, supra
 fairness, 271
 figures, 284
 forfeitures, 270
 condition involving, 310, 362
 form of instrument, 256
 four corner rule, 258
 fraud, intendments against, 269
 general and particular provi-
 sions, 282
 goodwill, sale of, 336
 grants, 330
 guaranty agreements, 330
 holidays, 345
 identifying subject matter, 258
 implied terms, 318
 indemnity contracts, 330
 inspection of instrument, 274
 instrument as measure of rights,
 247
 insurance contracts, 306
 intention of parties, 250, 252,
 258, 275, 279, 283, 294, 309
 ascertaining, 254
 from writing, 274
 code provisions, 253
 construction by parties, 304
 contract not expressing inten-
 tion, 255
 facts as they were, 255
 fundamental rule, 252, 253
 particular clauses subordinate,
 282
 particular intent, 283
 providing different contracts,
 255
 several instruments, 298, 299
 surrounding circumstances,
 254, 255, 294-298
 technical rules, 254
 words inconsistent with, 285
 joint and several agreements,
 341, 342

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Interpretation—Continued

judicial construction, right to, 249

jury, questions for, 328

justice, failure of, 270

language of instrument, 273

see words and phrases, *infra*

law and fact, questions of, 328

law as part of contract, 310

alteration or repeal, 312

decisions of courts, 313

foreign, 314

place of performance, 312

place where contract made, 312

presumption of knowledge, 310

repealed statutes, 314

statutes impairing obligations, 313

understanding of, 313

lease, negotiation of, 296

life support, contracts for, 333

lost instrument, 252

matters, 331

annexed, 320

referred to, 320

name given to instrument, 261

nature of instrument, 256, 257

negotiations, evidence as to, 264

fraud or mistake, 264

preliminary, 261

prior or contemporaneous, 264

obligation of contract, 313, 314

parol evidence to aid, see evidence to aid, *supra*

partial validity, 270

particular provisions, controlling general ones, 282

parties, 337

action of, 304

agency, 339

conduct of, 304, 306

construction by, 304

construction in favor of one, 307

designation of, 337, 338

joint and several contracts, 341

person causing uncertainty to exist, 307

person who prepared instrument, construction against, 307

promisee understanding, 308, 309

relation between, 340

CONTRACTS—Continued

Interpretation—Continued

parties,

representative capacity, 339

trust relation, 340

payment in specific articles, 336

place of performance, 359

pleading, consideration of, 275

practical construction, 305

preliminary negotiations, 261

printed matter, 283

promisee's understanding, 308, 309

promisor drawing contract, 308

public, contract with, 310

punctuation, 276

purpose, 256

questions of law and fact, 328

reasonableness, 271

references in contract, 320

to other writings, 321, 322

repugnancies, 280

restraint of trade, 336

room for interpretation, 277

rules, 247

contracts affected by, 247

statutory and common law, 247, 248

waiver, 248

sales, agreements, 335

lease or sale, 257

see sales

services, agreements for, 330

compensation, 368

severable contracts, 322

building and construction contracts, 325

severable provisions, 270

several instruments construed together, 298

collateral writings, 301

declaration of writing as complete, 302

effect to each, 300

extrinsic evidence to explain, 302

instruments not referring to each other, 301

made by different parties at different times, 302

one transaction, 299

question of fact, 301

skill and efficiency, 330

specific things and general words, 293

specifications, 331

statutory rules, 247

strangers, liberty to contradict terms, 251, 252

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Interpretation—Continued

- subject matter of instrument, 256, 295, 296, 330
- superseding oral negotiations, 262
- support, agreements for, 338
- surrounding circumstances, 264, 294
- terms implied as part of contract, 318
 - see words and phrases, *infra*
- time, 344
 - essence of contract, 352
 - extension of, 351
 - holiday, performance on, 345
 - intention of parties, 354
 - not specified, 346
 - performance, 344
 - reasonable, implied, 346
 - particular cases, 349, 350
 - question of law or fact, 348
 - subject matter, 355
 - surrounding circumstances, 355
 - waiver of requirement, 357, 358
- transfer of property, 334
- understanding of parties, 274, 275
- usage as part of, 315
- validity, construction in favor of, 268
 - preferred, 269
- vendor and purchaser, 335
- violation of law, 270
- whole instrument rule, 258
- whole time, 330
- words and phrases, 256, 259
 - abbreviations, 289
 - "about," 279
 - absurdity, 276, 279
 - "aforesaid," 290
 - "annulment," 291
 - "cancel," 291
 - context, 285
 - "conveyance," 292
 - courts, functions of, 326, 327
 - definition by parties, 285
 - evidence to show meaning, 286
 - figures, written words, 284
 - "free on board," 290
 - general words following specific enumeration, 293
 - "herein," 290
 - "hereunder," 290
 - "improvement," 293

CONTRACTS—Continued

Interpretation—Continued

- words and phrases,
 - "inclosed," 293
 - inconsistent, 281
 - with intention, 285
 - "install," 293
 - "installation," 293
 - interpretation for court, 289
 - not injurious, 298
 - language enclosed, 273
 - legal sense, 275
 - legal terms, 287
 - "limited," 291
 - literal meaning when departed from, 275
 - local significance, 288
 - meaning of words in general, 284
 - "more or less," 279
 - "negotiate," 292
 - "omission," 293
 - ordinary and popular sense, 284
 - "practicable," 291
 - "price," 292
 - "provided," 361
 - rejection of words, 281
 - "rescission," 291
 - "sale," 292
 - sense and reason, 275
 - sense in different parts, 286
 - sense in which terms were used, 265
 - special sense, 289
 - supplying words, 281
 - synonymous words, 285
 - technical, 276, 284, 286, 287
 - trade or commercial meaning, 285
 - understanding of parties, 274, 275
 - "whole time," 330
 - wrong word used, 281
 - "year," 291
- written and printed matter, 283
- Intoxication, 34
- Invalidity, see *Legality; Void and Voidable*
- Joint and several contracts, 341
- Judgment, quasi contract, 22
- Jury, questions for, 326, 328
- Justice, contracts affecting administration of, 130
- Labor, stipulations as to hours of, 246
- Language interpretation, rules of, 273

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Law, foreign law, 314
 part of contract, 310
 presumption as to knowledge, 310
 repealed statutes, 314
 see Mistake
 Law governing, breach, place of, 452
 delivery, place of, 236, 237
 execution of contract, 229
 formal requisites, 224
 illegal contracts, 97
 obligation of contract, 19
 parties, 80
 Leases, interpretation, 247
 Legal effect, see Mistake
 prohibition of performance, 440
 Legality, 95
 arbitration agreements, 130
 attorneys, legislation, agreements to influence, 124-127
 bank deposit pending on result of appeal, 130
 business licenses, 106
 business restrictions, see restraint of trade, *infra*
 consideration, 152
 restoration of, 154
 see Consideration
 construction in favor of validity, 268
 courts, administration of justice, 130
 ousting jurisdiction, 130
 criminal offense, compliance with statute, 103
 curing defect, 152
 damages, liquidated, 97
 duress and undue influence, 158
 effect of illegality, 148
 attitude of courts, 152
 basis of rule, 153
 hardship, 154
 leaving parties as found, 156
 parties in *pari delicto*, 155
 enforceability of illegal contract, 150
 equal fault, 155-159
 estoppel by conduct or laches, 152
 evidence, agreements to procure, 131
 suppressing, 132
 executed contracts, 98
 ex turpi causa, 98, 99
 independent cause of action, enforceability of, 160
 in *pari delicto*, 99

CONTRACTS—Continued

Legality—Continued
 intent, unlawful, 100
 interest, contract for, 103
 justice, administration of, 130
 laches, 152
 legislation, agreement to influence, 124
 professional services, 126
 licenses, 106
 lobbying contracts, 124, 125
 malum in se, 96, 98
 malum prohibitum, 96, 98
 marriage brokerage, 112
 mode of contracting prescribed by statute, 101
 object, legality of, 96
 officers, salaries of, 127
 ordinance, violation of, 103
pari delicto, 155, 157
 partial illegality, 148, 270
 entire contract, 149
 severable portions, 149
 parties not in *pari delicto*, 157
 penalty, implication from imposition of, 104
 performance, mode of, 99
 permit to do business, 106
 place, law of, 97
 pleading, illegality, 162
 presumption in favor of validity, 97
 promise growing out of illegal contract, enforceability of, 159
 public contracts, interest of officer, 128
 public officers, compensation of, 127
 interest in contract of public, 128, 129
 public policy, 98, 109
 agreements not to prosecute, 113
 architect's services, 122
 attitude of judiciary, 110
 attorneys' contract, 122
 brokers, agreements between, 114
 broker's commission, 122
 carrier's contracts, 117
 competition at sales, 113
 compounding crimes, 113
 contracts against, what are, 111
 contracts not to sue, 119
 conveyances of lands, 114
 fiduciary capacity, 114
 fraud on rights of others, 113

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Legality—Continued

- public policy,
 - government contracts, bidding, 113
 - husband and wife, agreements between, 116
 - justice, administration of, 130
 - liability, agreements for, relief from, 116
 - location of public buildings, 113
 - marriage, brokerage contracts, 122
 - immoral relations, 124
 - medical services, 122
 - option, waiver of, 114
 - particular cases, 118
 - public service, contracts affecting, 124
 - railroad termini or stations, 113
 - receivers, 115
 - restraint of trade, see Restraint of Trade
 - services, contracts for, 122
 - sexual immorality, 124
 - telegraph company's liability, 117
 - trust relations, 114
 - wages, assignment of, 123
 - waiver of statutory protection, 120
 - what is, 109
 - wills, contracts varying, 121
- public service, contracts affecting, 124
- purpose illegal, 100, 101
- lawful, 95
- ratification, 95
- restraint of trade, 133
 - ancillary agreements, 139, 143, 144
 - basis of rule, 136
 - breach of contracts, 453
 - capacity to what restraint extends, 142
 - construction of contracts, 336
 - development of doctrine, 133
 - duration, 141
 - goodwill, sale of, 139
 - partial restraint, 135, 137
 - partnership business, 135
 - sale of interest, 143
 - patent, agreement not to interfere with, 145
 - reasonableness of restrictions, 143
 - resale prices, 147

CONTRACTS—Continued

Legality—Continued

- restraint of trade,
 - restricting use or sale of property, 146
 - sale prices, fixing, 146
 - status of agreement, 137
 - statutory construction, 135
 - statutory rule, 134
 - stockholder's interest, sale of, 144
 - territorial extent, 140
 - void or voidable agreements, 137, 138
- services illegally rendered, 103
- sources of illegality, 96
- statute, express or implied prohibition, 103
 - implication from imposition of penalty, 104
- licenses and permits, 106
- repeal of prohibitory law, 106
- violation of, 102
- statutory mode of contracting, 101
- stock transactions, 108
- turpitude, contracts involving, 124
- unenforceable contracts distinguished, 97
- usury statutes, 108
- validity of legal contracts, 95
- Legislation, agreement to influence, 124
 - lobbying contracts, 125
 - professional services in, 126
- Liability, public policy as to agreements for relief from, 116
- Licenses, illegal contracts, 106
- Lien claimants, building contracts, recording and filing, 240, 243
 - formal requisites of contract, 222, 223
- Lobbying contracts, legality, 125
- Lost contract, oral evidence, 252
- Malum prohibitum or malum in se, see Legality
- Married women, capacity, 36
 - see Husband and Wife
- Master and servant, assignment of wages, 123
 - implied contract, 23
 - public policy of contracts, 118
- Meaningless thing, construction to be avoided, 268

[The numbers in this Index refer to pages]

CONTRACTS—Continued

- Meeting of minds, 15
 - agreement to reduce contract to writing, 226
 - consent, mutuality, 41
 - consideration, 173
 - definiteness or certainty, requisite, 215
 - mistake, 84
 - mutual consent, 43, 44
 - two or more persons, 31
- Memorandum, see Writing
- Menace, definition, 66
 - lack of offer, consent, 65
 - unlawful, 66
- Mental capacity to contract, 32
- Mental condition of parties, 71
 - confidential relations, 72, 73
 - ignorance of contents of instrument, 86
- Merger, 380
- Mexican law, 13
- Minors, contracts of, 34
 - parties to contract, 30, 34
- Mistake, 78
 - accepting instruments in ignorance of contents, 84
 - arises how, 79
 - collateral matter, 79
 - completeness of instrument, 84
 - conflict of testimony, 92
 - consent not free, 78
 - to be free, 42
 - consideration, amount of, 80
 - effect, 78
 - equity, complaint in, 78
 - essential features of contract, 79, 80
 - evidence, 84, 92
 - conflict, 92, 93
 - parol proof, objection, 93
 - presumption, 93
 - sufficiency, 93
 - fact, 81
 - elements of, 81
 - foreign law, 88
 - ignorance of legal rights, 82
 - relief from mistake of, 86
 - what constitutes, 81, 82
 - failure to express agreement, 83
 - to read, 85
 - fraud, 79
 - and undue influence, 85
 - ignorance of contents of instrument, 84
 - intention of parties, 83, 84
 - kinds, 78
 - law, 87
 - decision of courts, 90

CONTRACTS—Continued

- Mistake—Continued
 - law,
 - effect of instrument, 90
 - foreign law, 88
 - ignorance, 88
 - misrepresentation of, 91
 - release of damages, 91, 92
 - relief from mistake, 87
 - when granted, 88
 - rescission, 88
 - materiality, 79, 80
 - minds, not meeting, 84
 - misunderstanding as to terms, 46
 - penal evidence, 83
 - pleading, 79
 - relief from mistake of fact, 86
 - use of, 80
 - subject matter, existence of, 80
 - identity of, 80
 - void and voidable contracts, 30, 78
- Misunderstanding, see Mistake
- Mode of contracting, illegal, 101
- Modification, 372
 - agent, 374
 - consent, 373
 - consideration, 373, 378
 - effect of, 379
 - methods of, 373
 - oral modification of written contract, 375
 - question of fact, 374
 - rescission, partial, 373
 - rights of parties, 372
- Moral obligation, 16
 - consideration, 171
- Moral turpitude, contracts involving, 124
- Municipal contracts, implied, 24
- Municipal corporations, power to contract, 38
- Mutual consent, 41, 43
- Mutuality, 211
 - acceptance of offer, 65, 211, 212
 - buying and selling, 212
 - compelling performance, 215
 - consideration, 211
 - creation by bringing action, 213
 - exchange of properties, 212
 - excuse from performance, 213
 - necessity, 211
 - obligation generally, 211
 - options, 214
 - period of time, 213
 - remedy, mutuality of, 214
 - signing contract, 215
 - unilateral contracts, 213

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Negligence, agreements for relief from liability, 116

Negotiations, agreement to enter into, 45

consideration of in interpreting contract, 261

definite agreement, 44

merger of, 380

Non compos, capacity of parties, 32

Nonexistence of subject matter, 443

Novation, see Modification

Object, illegal, 96

Obligation, basis of, 18

breach of, see Breach

contract as source of, 15

definition, 15, 16

elements of, 19

how arises, 15

intention of parties, 19

law entering into, 313

legal duty, 18

mutuality, necessity of, 211

performance, obligation to perform, 396

reciprocal, 211

statutes impairing, 313

tort and liability, 16

Offer of performance, see Performance

Offers, 47

acceptance,

absolute, 62

assignees, 60

benefits accepted, 60

communication, 54

conditions, 53, 54

confirmation, 55

conduct signifying, 59

counter proposals, 63

effect of, 53

estoppel, 58

intention, 62

letters and telegrams, 57

letters between parties, 63

mode of, 57

modification of offer, 62

necessity for, 53

performance of condition, 59

promise of nothing in return, 65

unqualified, 62

rejected offer, 53

sufficiency of, 61

telegrams, 57, 58

terms, varying from offer, 62

time for, 55

CONTRACTS—Continued**Offers—Continued**

acceptance,

unilateral and bilateral contracts, 63

writing, 58

advertisements, 47

agents, 47

auction sales, 47

bids for public work, 47

communication, 47

consent analyzed, 47

continuing offers, 48

death of proposer, 52

definiteness, 47

intention to create legal relation, 48

mutuality of contracts, 211

newspaper notices, 48

options, 48

acceptance, 54

conditions, 54, 55

consideration, 49

definition, 48

escrows, 51

expiration, 51

fraud, 52

nature of, 49

rejection, 51

revocation, 49

signature, 49

time for acceptance, 55, 56

unilateral contract, 214

withdrawal, 50, 51

order for goods, 52

person making, 47

place of completion, 55

privity of contract, 59

promise called for, 65

quantity, determination of, 48

revocation, 51

rejection, acceptance of rejected offer, 53

rewards, 47, 64

sales, quantity, 48

services, offer to perform, 65

specific performance, 49

test of agreement, 49

time open, 53

unilateral contract, 214

Officers, see Public Officers

Options, see Offers

Oral agreement, see Modification

evidence, see Evidence

promises, see Writing

Ordinance, contracts in violation of, 103

Parent and child, confidential relations, 75

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Pari delicto, see *Legality*
Parol contract, see *Writing*
 evidence, see *Evidence*
Partial illegality, see *Legality*
performance, 424
Parties, 30
 see *Confidential Relations; Interpretation*
 acceptance of agreement, 40
 assignments, 41
 breach of contract, action for, 468-477
 capacity, 31
 conduct of construction, 304
 confidential relations, 72
 conflict of laws, 30
 construction by, 304
 in favor of one, 307
 corporations, 38
 description, 39
 designation of, 337
 essential elements, 30
 government and governed, 31
 governments, 38
 husband and wife, 36
 identification, 39
 infants, 34
 insane persons, 32
 intoxicated person, 34
 joint and several contracts, 341
 married women, 36
 mental capacity, 32
 minors, 30, 34
 misjoinder or nonjoinder, 476
 pari delicto, see *Legality*
 person, dealing with himself, 31
 non compos, 32
 not named, 40
 unsound mind, 30
 power to contract, 31
 relation between, 340
 representative capacity, contracts in, 339
 rescission, 33, 34
 test of capacity, 34
 signature, 40
 status, 38
 substitution, 40
 sureties, 40
 third person, contract for benefit of, 469-474
 transfer of obligation, 41
 trust relationship, 340
 two or more essential, 31
 United States, 38
 unsound minds, 32, 38

VI Cal. Jur.—78

4

CONTRACTS—Continued

Partnership, interpretation of contract, 248
 sale of interest, 143
Part payment, agreement to accept, 185, 186
Patent, agreement not to interfere with, 145
Payment in specific articles, 336
 see *Compensation; Consideration*
Penalty, illegal contracts, 104
Performance, 396
 acceptance of work, 432
 alternative stipulations, 398
 approval by third person, 419
 assignment, right of, 41
 breach of performance, see *Breach*
 capacity to contract, 31
 compensation, right to, 368
 completion of work by owner, 428-431
 conditions, 396, 399
 duty to fulfill, 399
 forfeiture, 401
 mutual and concurrent, 401
 pleading performance, 402
 waiver, 402
 consideration, performance of legal obligation, 179
 contracts, terms of, 397
 demand, 399, 403, 404
 destruction of building, 426
 agreement by owner to insure, 428
 effect of, 414
 excuses for nonperformance, 433
 act of God, 441
 act of public enemy, 441
 death, 448
 destruction of building, 445-447
 destruction of subject matter, 443
 general rules, 433
 impossibility, 439
 legal prohibition, 440
 mutuality, lack of, 213
 nonexistence of subject matter, 443
 operation of law, 440
 pleading excuse, 449
 prevention by one party, 436
 prevention generally, 435
 war conditions, 442
 legal method presumed, 99
 legality presumed, 100
 mutuality of contract, 215

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Performance—Continued
 notice to perform, 396
 obligation to perform, 396
 offer of, see tender or offer,
 infra
 partial, 424-426
 place of, 359
 prevention as breach, 454
 receivers, 398
 rescission for default in, 392
 satisfaction of one party, 417,
 418
 selection of alternatives, 398,
 399
 substantial, 420
 sufficiency of, 420
 what constitutes, 422-424
 sufficiency, 415
 general rules, 415-417
 time of, 344-359
 tender or offer, 405
 conditional offer, 407
 defective tender, 411
 essentials generally, 405-407
 place, 407
 production of thing, 409-411
 time, 407
 waiver of, 412-414
 waiver, acceptance as, 432
 waiver of defects or objections,
 431
 Permits, illegal contracts, 106
 Physical condition of parties, 71, 73
 Physician and patient, confidential
 relations, 75
 Place of performance, 408
 Plans and specifications, recording
 contracts, 240-243
 Policy of state, see *Legality*,
 supra
 Pleading, amendments to, 491
 cross-complaint, 489
 consideration, illegal, 193
 pleading and proof, see *Con-*
 sideration
 excuse for nonperformance, 449
 execution of contract, 238
 express contract, 21
 illegality of contract, 162
 implied contracts, 20
 mistake, 79
 performance of conditions, 402
 plaintiff, pleading and proof,
 479
 promise, averment of, 20
 statement of contract, 477
 undue influence and unfair ad-
 vantage, 484
 variance, 484

CONTRACTS—Continued

Practical construction, 306
 Precedent conditions, 363
 definite agreement, 44, 45
 Preliminary negotiations, consid-
 eration of, 261
 Presumption, consideration, see
 Consideration
 Prevention of performance as
 breach, 454
 excuse for nonperformance, 435
 Price, definiteness or certainty,
 215, 218
 restriction on, 146, 147
 Printed matter, 283
 Procuring evidence, 131
 Production of thing, performance,
 409
 Promise as consideration, 187
 inferred, 20, 21
 mutuality, 211
 quasi contracts, 22
 Proposals, see *Offers*
 Provision for another contract, 16
 Public contracts, officers' interest
 in, 128
 Public enemy, excuse for nonper-
 formance, 441
 Public improvement, specification
 of, 221
 Public officers, contracts affecting
 compensation, 127
 personal interest in contract,
 128
 Public policy, contracts contraven-
 ing, see *Legality*, *supra*
 illegal contracts, see *Legality*
 trust, public policy as to con-
 tracts in fiduciary capacity,
 114
 Public service, contracts affecting,
 legality, 124
 Punctuation, 276
 Purpose, illegal, 96
 interpretation, rules of, 256
 unlawful, 100
 Quantity, definiteness or certainty,
 218
 Quasi contracts, 21
 judgments, 22
 Questions for court and jury, 326-
 329
 of law and fact, 452
 Railroads, fire, contract relieving
 from liability, 118
 right of way, mutuality of
 agreement, 214
 ticket as contract, 17

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Ratification, 93
 acts constituting, 94
 fraud, 94
 illegal contracts, 95
 Reasonableness of construction, 271
 Receipt as contract, 17
 release distinguished, 18
 Reciprocal obligations, 211
 Recording, bond, contractors, 243-246
 building contracts, 240
 statutory rules, 240-243
 References, consideration of, 320
 Reformation, mistake, 83
 Release, as binding obligation, 18
 Remedies, breach of contract, 463
 mutuality of, 214
 uncertainty, degree of as affecting remedy, 220
 Renunciation as breach, 458
 Repudiation as breach, 458
 Repugnancies, interpretation, 280
 Resale prices, 147
 Rescission,
 benefits conferred, 387
 bringing suit, 386
 action to foreclose, 384
 capacity to contract, 33, 34
 consent, want of, 43
 consideration, failure of, 391
 return of, 387
 damages, right to, 389
 default in performance, 392
 destruction or cancellation of writing, 383
 election to rescind, results of, 388
 grounds for, 389, 390
 implied, 383
 mistake of law, 88
 mutual consent, 382
 notice, 386
 one party, rescission by, 385
 option to rescind, 384
 time for exercise, 384, 385
 parol evidence, 384
 place other party in statu quo, 387
 promptness, 386
 restoration, 382, 387
 parties, rights of, 387
 right of, 382
 statutory requisites, 385
 third party, rights, 389
 time limited, contract without, 384
 unenforceable contract, 388
 waiver, 386

CONTRACTS—Continued

Restraint of trade, see Legality
 Revenue stamps, 230
 Rewards, offers of, 64
 Sales, executory contract, 27
 mutuality of contracts, 211
 resale prices, 147
 restricting sale of property, 146
 sale of business, restraint of trade, see Legality
 Satisfaction, performance to, 417
 Scope of article, 11
 Sealed instrument, consideration presumed, 204
 Seals, 234
 corporate, 235
 duration, 218
 effect, 235
 execution of instrument, 228
 sufficiency, 234, 235
 Services, contract for, public policy, 122
 illegal contracts, 103
 implied contracts, 23
 Severable contracts, breach of, 450
 interpretation, 322
 Several instruments, construed together, 294
 Signature, 230
 addition beneath, 232
 binding effect, 232
 by third person, 231
 execution of instrument, 228, 229
 executory contract to perform work, 232
 failure of all parties to sign, 233
 identification of parties, 39, 40
 mutuality, 215
 necessity, 231
 parties not signing, 232
 public officers, 232
 requisites of, 230, 231
 separate instruments, 234
 "signed," "subscribed," meaning, 231
 signing without reading, 84
 Spanish-Mexican law, 13
 Specific articles, contract to pay in, 467
 Specifications, uncertainty, 221
 Spiritual adviser, confidential relations, 75
 Stamps, 230
 States, parties to contracts, 38
 promise by state to county, 26
 Statute of frauds, see Writing

[The numbers in this Index refer to pages]

CONTRACTS—Continued

Statutes, contracts in violation of,
 see Legality
 obligation arising from, 24
 repeal of prohibitory law, 108
 waiver of statutory protection,
 public policy, 120
 Statutory mode of contracting, il-
 legality, 101
 Stipulations, interpretation, 248
 Stockholder's sale of interest, 144
 Street assessment as contract, 25
 Subject matter, interpretation ac-
 cording to, 330
 rules of, 256
 Subjects treated, 11
 Subscription, see Signature
 Subsequent conditions, 367
 Substantial performance, 420
 Substitution of parties, 40
 Support, contracts for, 333
 definiteness and certainty, 217
 Suppressing evidence, 132
 Suretyship, interpretation, 248
 parties to contract, 40
 Surrounding circumstances, con-
 sideration of, 294
 Systems of law, 13
 Technical words, 287
 see Interpretation
 Tender of performance, see Per-
 formance
 Terms, breach of contract, 451
 Third person, contract for benefit
 of, 469
 enforcement of contract for
 benefit of, 474
 intent to benefit, 473
 Threats, 66, 67, 68
 Time, see Interpretation
 duration, definiteness or cer-
 tainty, 218
 mutuality of contract, 213
 performance, time of, 408
 Tips, contract to surrender, 123
 Tort, liability converted into con-
 tract, 16
 obligation as outgrowth, 16
 Trade, restraint of, see Legality
 Transfer of property, 334
 Trusts, confidential relations, 75
 Turpitude, contracts involving,
 124
 Ultimate contract, 16
 Undue influence, affirmation of
 contract, 77
 confidential relations, 72
 definition, 70
 fraud and deception, 70

CONTRACTS—Continued

Undue influence—Continued
 ignorance of contents of instru-
 ment, 85
 pleading, 72
 presumption, 72
 remedy, 77
 rescission, 77
 setting aside contract, 70
 situation of parties, 71
 void and voidable contract, 77
 Unenforceable contracts, illegal
 contracts distinguished, 97
 Unilateral contracts, consent, 63
 mutuality, 213
 United States, party to contracts,
 38
 Unsound mind, 32
 Usage and custom, expressed pro-
 visions in law, 317
 interpretation according to, 311,
 312
 part of contract, 315
 terms implied, 318
 Use of property, restriction on,
 146
 Validity, construction in favor of,
 268
 see Legality
 Variance in action for breach,
 484
 Vendor and purchaser, mutuality,
 213
 see Sales
 Verbal promises, see Writing
 Void and voidable, 28, 77
 consent, want of, 43
 construction in favor of valid-
 ity, 268
 definiteness or certainty as
 requisite, 213
 illegal contracts, see Legality
 mistake, 78
 Wages, assignment of, 123
 breach of contract, 462
 Waiver, acceptance as, 432
 defects or objections, 431
 War conditions, excuse for non-
 performance, 442
 Warehouses, public policy, 118
 Water, contract to supply cer-
 tainty, 217
 Whole contract, construction of,
 258
 Wills, contract varying will, pub-
 lic policy, 121
 covenant not to contest, 119
 Words, meaning of, see Interpre-
 tation

[The numbers in this Index refer to pages]

CONTRACTS—Continued

- Work and labor, implied contract, 23
- Writing, agreement to reduce contract to writing, 226
 - blanks left, 227
 - execution of instrument, 228
 - extra work, 225
 - incomplete instruments, 227
 - insurance, 225
 - intention, deduced from, 274
 - interpretation, rules of, 247
 - municipal contracts, 225
 - necessity for, 224
 - oral modification, 375
 - partial oral and partial written, 227
 - printed matter, 283
 - statute required, 224, 225

CONTRIBUTION—

- Actions, 513
 - accrual of, 520
 - assignment, 517
 - defenses, 519
 - demand, 522
 - form of, 513
 - nature of, 513, 514
 - notice, 522
 - parties, 517
 - remedies, 513
 - undetermined liability, 515
- Assignment, cause of action, 517
- Basis of right, 498
- Bills and notes, parties to, 505
- Code rules, 499
- Co-owners of property, 506
- Commercial paper, parties to, 505
- Compulsory, payment necessary, 505
- Defenses, pleading, 519
- Definition, 498
- Demand, 522
- Devisees, 510
- Equitable remedy, 513
- Equity and right, 499
- Evidence, 523
- Execution, 524
- Insurance, beneficiaries of, 508
 - marine, 508
- Irrigation ditches, 507
- Joint debtors, judgment debtors, 509
 - release of one, 500
- Joint liability, 499
- Joint tenants, 506
- Judgment debtors, 509
 - payment of judgment by co-debtor, 515

CONTRIBUTION—Continued.

- Legatees, 510
- Liability in distinct proportions, 499, 500
- Limitation, statute of, 520
 - accrual of action, 520
 - obligation taken up by way of assignment, 521
- Marine insurance, 508
- Nature, 498
- Parties to action, 517
- Payment as foundation for contribution, 504
 - voluntary, 505
- Pleading, averments in complaint, 519
- Primary and secondary liability, 499
- Promissory notes, parties to, 505
 - right of distributee, 506
- Release of one or more joint debtors, 500
- Remedies, 513
 - cumulative, 516
 - payment of judgment by co-debtor, 515
- Right to, 499
- Stockholders, 511
 - statutory right, 512
- Subscriptions, liability on, 500
- Sureties, 501
 - application of rules, 503
 - co-contractors, rule as to, 503
 - contribution between, 501
 - payment by surety, 504
 - presumption of solvency, 502
 - primary liability, 502
- Tenants in common, 506
- Tort-feasors, 512
- Trustees, 506
- Undetermined liability, 515
- Volunteers, 504
- Water, agreements concerning, 507

CONTRIBUTORY NEGLIGENCE—

See cross-reference, 524

CONVERSION AND RECONVERSION—

- Contract for sale of land, 527
- Definition, 525
- Discretion of trustee, 528
- Eminent domain, land taken by, 528
- Equitable principles, 526
- Foreign lands, 536
- Homestead, will, directing sale of, 534

[The numbers in this Index refer to pages]

CONVERSION AND RECONVERSION—Continued

- Insurance on buildings, proceeds of, 529
- Intention, question of, 532
- Land, contracts for sale of, 527
 - taken for public use, 528
- Mortgaged property, destruction by city, 529
- Origin of rule, 526
- Personalty, realty converted into, 530
- Principles on which rule based, 526
- Public use, land taken for, 528
- Reconversion, 537
 - acts which effect, 539
 - burden of proof, 538
 - equitable rules, 537
 - unanimity of beneficiaries, 538
- Rules applied, 528
- Sale of land, contract for, 527
- Sale under will, power of, 533
- Scope of article, 525
- Trust invalid, doctrine not applicable to, 529
- Trustees' power to sell, requisites of, 528
- Vendor and purchaser, agreements, 527
- Will, contract to sell property disposed of by, 535
 - conversions under, 530
 - doctrine not favored, 532
 - homestead, directing sale of, 534
 - intention, 532
 - land situated in foreign state, 536
 - persons benefited by direction to convert, 534
 - power to sell under, 533
 - realty converted into personalty, 530
 - time for conversion, 531

CONVEYANCES—

See cross-reference, 540

CONVICTION—

See cross-reference, 540

CONVICTS—

See cross-reference, 540

CO-OPERATIVE ASSOCIATIONS—

See cross-reference, 540

COPARCENERS—

See cross-reference, 540

CORONERS—

- Compensation, 546
- Consolidation of officers, 542
- Contempt, power to punish, 547
- Deputies, 542
- District attorney, presence of, 547
- Duties, 542
 - acting for other officers, 546
 - who may perform, 541
- Evidence, record as, 548
- Fees, 546
- Health measures, 544
- Jury, 543
 - discretion as to holding, 545
 - evidence, 548
 - second, 545
- Justice of the peace acting, 542
- Nature of office, 541
- Physician, summoning, 543, 546
- Post-mortem examination, 543
- Property of deceased, 544
- Public administrator, coroner acting for, 546
- Record, 543
 - as evidence, 548
- San Francisco county, 541
- Scope of article, 541
- Sheriff, coroner acting for, 546
 - performing duties of coroner, 542
- View of body, 543
- Warrant for arrest, 544
- Witnesses, 543, 546
 - binding over, 544-547
 - testimony, 547

CORPORATIONS—

- Actions by and against corporations (in vol. 7)
 - by stockholders, see Stockholders
- Agents, see Officers and Agents
- Aggregate corporation, 603
- Amendment of general laws, 618
- Articles, see Incorporation
- Assessment on stock, 947
 - action to enforce, 975
 - amount of, 956
 - attack on, 977
 - conditions, 954
 - discharge of liability, 976
 - enforcement, 965
 - by action, 975
 - general considerations, 947

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued

Assessment on stock—Continued
 injunction, 977
 irregular proceedings, attacking, 980
 irregularity, beginning proceedings anew after, 970
 levy, 965
 by insolvent corporation, 949
 fully paid stock, 951
 limitations or conditions, 954
 order, 965
 subscribed stock, 951
 who may make, 949
 limitations, 954
 limitation of liability, 976
 action attacking assessment, 981
 nature of liability, 948
 nonassessable stock, 953
 notice, delinquency, 968
 form of, 966
 publication and service, 967
 parties liable, 961
 purposes, 958-961
 record holders, 961
 sale, bidding for and purchase of stock, 972
 enforcement of assessment, 971
 postponement of delinquent sale, 969
 purchase by corporation, 974
 strict compliance, necessity for, 950
 subscription of one-fourth of stock, 955
 subscribers liable, 961
 transferee's liability, 963
 trustees' liability, 964
 uniformity, 957
 void assessment, attacking, 977
 waiver and election to proceed by suit, 976
 Associations distinguished, 582
 attachment, levy on shares, 809
 Attributes in general, 579
 Blue sky law regulations, 778
 Board of directors, see Directors
 Bonds and bonded indebtedness (in vol. 7)
 By-laws, 706
 adoption, 708-710
 amendments, 710
 construction, 713
 contents, 712
 contract, by-laws as, 718
 evidence of, 711

CORPORATIONS—Continued

By-laws—Continued
 limitations of corporate power, 716
 persons bound by, 719
 power to adopt, 710
 to grant, 707
 record of, 711
 repeal, 710
 retrospective operation, 717
 validity, 713-715
 waiver, 720
 California law, peculiarities, 578
 Capital stock, see Payment for Stock; Subscriptions to Stock
 actions for stock, 736
 amount subscribed, articles of incorporation, 632
 articles of incorporation, 631
 assessments on stock, see Assessment
 certificates as distinguished from shares, 733
 fraudulent or unauthorized issue, 755
 issuance of, 750
 duplicate certificate, 757
 fraudulent or unauthorized, 755
 necessity for, 753
 new certificate, effect of, 756
 prior to full payment, 752
 nature and form of, 751
 right to particular, 734
 damages, market value as basis of, 742
 distribution or reduction, liability of officers and agents (in vol. 7)
 existence of, 732
 increase, 743
 certificate of proceedings, 747
 notice of meeting, 745
 procedure for, 744
 issue of certificate, 750
 compelling, limitations applicable, 754
 lien of corporation, 748
 contract lien, 749
 creation of lien as against bona fide purchaser, 748
 statutory provisions, 749
 market value, 740, 742
 ownership, actions to determine, 737
 possessory actions for, 736

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued

Capital stock—Continued

par value, 740, 741

payment, see Payment for Stock

preferred, 738

creation of preferences, 738

limitation upon preferences, 740

records required to be kept, 728

reduction, 743, 746

certificate of proceedings, 747

shares, nature of, 732

situs of stock, 733

specific performance of stock agreement, 735

value, par and market, 740

Certificate, see Incorporation

Charter, see Creation; Incorporation

alteration, 620

scope of reserved power, 621

amendment of general laws, 618

contract, charter as, 619

Classification, 602

Collateral attack, de facto corporation, 650

Consolidation, 646

consent of stockholders, 646

statute of companies after, 647

transmission of powers and liabilities, 648

Continuing existence under codes, 652-654

Contracts, ultra vires (in vol. 7)

Contractual powers (in vol. 7)

Corporate entity, 589

existence, see Existence

Counties as corporation, 607

Creation, 610

amendment of general laws, 618

assignment of franchise or special privilege, 616

condition precedent, 622

conferring special benefits, 616

general or special act, 610, 611, 612

implication, creation by, 614

incorporation by grantees of franchise, 616

incorporators, 624

name, change of, 613

recognition by legislature, 613

statutory provisions, compliance with, 622

substantial compliance with law, 623

CORPORATIONS—Continued

Crimes, liability for (in vol. 7)

Criminal liability of officers (in vol. 7)

proceedings, proof of corporate existence, 670

Debts, officers' liability for (in vol. 7)

Deed of trust (in vol. 7)

De facto corporations, 654

elements of, 656

estoppel, 654

to deny existence, 663

existence de facto, 654

freedom from collateral attack, 650

law authorizing, 657

organization in good faith, 657

powers of, 659

right to question existence, 662

Definition, 579

Directors, 1039

admissions, 1100

appointment, 1093

adverse interest in general, 1074

authority, 1092

ostensible or apparent, 1099

proof or presumption as to, 1095

writing, when required, 1098

avoiding transaction, right as to, 1083

board, action duly assembled as, 1069

certificate naming, 1042

compensation, 1087, 1091

extra or onerous services, 1091

holding stock as affecting, 1090

implied, 1089

creditors of corporation, officers as, 1081

dealing with corporate property, 1077

dealings, corporation represented by other officers, 1080

with other than directors, 1066

de facto officers, 1046

duties and liabilities, 1048

nonstockholders as directors, 1047

powers, 1048

validity of acts, 1049

delegation of corporate power, 1068

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued

Directors—Continued

election of, see Elections
 estoppel, 1085
 executive committee, 1107
 fiduciary relationship, 1071
 inducement for act or vote,
 1073
 interested director, vote of,
 1075
 interlocking directors, 1076
 knowledge of corporate busi-
 ness, 1066
 management of affairs, 1065
 meetings, 1051
 adjourned meetings, 1057
 notice of, 1051
 proof of service, 1060
 special meetings, 1054
 waiver of, 1061
 place, 1052
 presumption of regularity,
 1058
 quorum, 1062
 interested director as part
 of, 1064
 unfilled vacancies, 1063
 regular meetings, 1053
 secretary's duty, 1060
 special meetings, 1054
 who may call, 1056
 named in articles, 1042
 nature of position, 1039
 nonstockholders as directors,
 1047
 number, 1045
 organization of board, 1044
 pleading, corporate contracts
 sued on, 1094
 preference where corporation is
 insolvent, 1082
 purchase of claims against
 company, 1082
 qualification, 1040
 holding stock, 1041
 quantum meruit, recovery on,
 1086
 relation to stockholders in pri-
 vate dealings, 1072
 removal of, 885
 representative of corporation
 dealing with himself, 1079
 resolution, necessity of, 1096
 salaries, fixing, 1088
 secret profits, accounting for,
 1085
 tenure of office, 1043
 term of office, 1093

CORPORATIONS—Continued

Directors—Continued

title to office, mode of trying,
 1050
 vacancies, filling, 1043
 Dissolution (in vol. 7)
 Dividends, 852
 action to recover, 861
 discretion of directors, 855
 life tenant and remainderman,
 rights of, 860
 mining corporation, 854
 persons entitled, 856
 pledgor and pledgee, rights of,
 858
 profits, dividends from, 853
 purchaser's or creditor's rights
 of, 859
 right to, 852
 stock dividends, 856
 Elections, 881
 see Meetings
 adjournment, 884
 attacks on validity, 882
 bona fide stockholder, 890
 cumulative voting, 892
 general rules, 881
 personal representative, 891
 persons who may attack, 883
 pledgee, 891
 postponement, 884
 proxies restrictions on, 895
 right to vote by, 894
 record holder of stock, 889
 removal of directors, 885
 separation of voting power and
 ownership, 896
 stockholder's right to vote, 887
 trustee, 891
 voting trusts, 896, 897, 899
 Entity, 589
 continuing business of partner-
 ship or individual, 601
 disregard of, 591
 evidence of identity, 599
 instrumentality of partnership,
 595
 one-man corporations, 592, 594
 reincorporation, 597, 598
 Estoppel to deny existence, 654,
 663
 Evidence, existence of corpora-
 tion, proof, 667
 Examination, 589
 Existence, 650
 admissions by pleading, 671
 proof by, 670

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued**Existence—Continued**

- continuing under codes, 652-654
- criminal proceedings, proof in, 670
- de facto, 654
- denial of, 667
- estoppel, 654
- extension of, 650
- foreign corporation, 673
- levy on, shares, 809
- parol proof of, 669
- period of, 650
- pleading, 664
- presumption, 673
- proof of, 667
- term of, 630
- Extention of existence, 650
- Filing articles, see Incorporation
- Foreign corporations, (in vol. 7)
 - existence, proof of, 673
- Forfeiture of corporate charter (in vol. 7)
- Formation, see Creation; Incorporation
- Franchise, assignment of, 616
- incorporation by grantees of, 615
- Franchise tax (in vol. 7)
- Functions of corporations (in vol. 7)
- General act, creation by, 610
- Growth of corporate activity, 584
- Homestead corporation, 608
- Identity, evidence of, 599
- Incorporation, see Creation; De Facto Corporations; Promoters
 - acknowledgment of articles, 632
 - amendment of articles, 642
 - execution and filing, 643
 - amount of stock subscribed, 632
 - articles, 626
 - filing, 636, 638, 639
 - avermnt of, 664
 - capital stock, 631
 - certificate, 626
 - issuance of, 636
 - contents of article, 626
 - defective organization, liability in case of, 625
 - evidence, articles and certificate as, 634
 - filing articles, 636
 - copies in counties, 638, 639
 - pleading failure, 640
 - incorporators, 624

CORPORATIONS—Continued**Incorporation—Continued**

- name, 627
- organization after, 645
- pleading, 664
- principal place of business, 629
- purposes, statement of, 628
- subscription of articles, 632
- taking advantage of corporate incapacity, 666
- term of existence, 630
- Increase of capital, see Capital Stock
- Industrial loan company, 609
- Inspection, see Stockholders
- Irrigation company, 606
- Issue of stock, see Payment for Stock
- Kinds of corporations, 577
- Legislature, limitation on power of, 586
- power of, 585
- Levee districts, 606
- Liabilities of corporations (in vol. 7)
- License tax (in vol. 7)
- Lien on stock, see Capital Stock
- Massachusetts trust, 583, 781
- Meetings, 874
 - see Elections
 - annual meetings, 879, 880
 - calling annual meetings, duty as to, 879
 - directors' meetings, see Directors
 - notice, 874
 - annual meetings, 879, 880
 - purpose, 876
 - waiver and estoppel, 877
 - place of meeting, 877
- Mining partnerships, 583
- Minutes, see Records
- Misappropriations, officers' liability for (in vol. 7)
- Mortgages (in vol. 7)
- Name, 674
 - articles of incorporation, 627
 - change, 679
 - as creation, 613
 - corporations, powers to change, 681
 - hearing of petition, 682, 683
 - change, judicial nature of proceedings, 680
 - order for, 683
 - petition for, 681
 - misnomer, 675

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued

Name—Continued

- similar corporate names, use of, 677
- trade name, use of, 678
- New corporation, extent of liability, 600
- Officers and agents,
 - appointment, 1093
 - authority in general, 1092
 - admissions, 1100
 - necessity of resolution, 1096
 - ostensible or apparent, 1099
 - parol evidence as to, 1137
 - proof or presumption as to, 1095
 - writing when required, 1098
 - bonds, 1112
 - liability on for defalcations, 1114
 - term of, 1113
 - compensation, 1086
 - holding stock as affecting, 1090
 - implied contract, 1089
 - creditors, officers as, 1081
 - de facto officers, 1046
 - directors, see Directors
 - distribution of capital stock (in vol. 7)
 - estoppel, 1129
 - distinctions, 1125
 - execution of instruments, 1130
 - executive committee, 1107
 - knowledge outside scope of duties, 1117
 - effect of adverse interest of officer, 1118
 - imputing between corporation and officer, 1115
 - liability of (in vol. 7)
 - criminal (in vol. 7)
 - misappropriations (in vol. 7)
 - personal, 1132
 - with respect to reports (in vol. 7)
 - manager, 1108
 - limitation on powers, 1111
 - pleading corporate contracts sued upon, 1094
 - powers, 1109
 - president, 1101
 - powers, 1102
 - promise in corporate name, 1136
 - purchase of claims against company, 1082

CORPORATIONS—Continued

Officers and agents—Continued

- ratification, 1119, 1122
 - estoppel distinguished, 1125
 - express, 1126
 - implied, 1127
 - knowledge of material facts, 1120
 - time for ratifying or disaffirming, 1123
 - who may ratify, 1124
- reduction of capital stock (in vol. 7)
- rights, powers and duties, 1039
- salaries fixing, 1088
- secret profits, accounting for, 1085
- secretary, 1104
 - notice of meetings, 1060
 - powers, 1105
- signatures, 1134-1137
- term of office, 1093
- title to office mode of trying, 1050
- treasurer, 1106
- unauthorized officer, liability of, 1131
- vice-president, 1103
- One-man corporations, 592, 594
- Organization, 610
 - after incorporation, 645
 - see Creation; De Facto Corporations; Incorporation; Promoters
- Partnership, corporation as instrumentality of, 595
- corporation continuing business of, 601
- Payment for stock, 900
 - accrual of right of action, 944
 - call by corporation as condition to creditor's suit, 933
 - creditor as judgment creditor, 936
 - creditor's rights, 911, 912
 - creditor's suit, parties defendant, 938
 - parties plaintiff, 937
 - discharge of liability, 940
 - enforcement of liability, 928
 - by assessment, 930
 - subscription contract by corporation, 929
 - exhausting legal remedies, 935
 - fictitious stock, 900, 902
 - forfeiture of stock as discharging liability, 943

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued

Payment for stock—Continued
 fraud as basis of creditor's rights, 911
 issue as bonus, 919
 certificate as representation of full payment, 906
 corporation in financial straits, 904
 for check or note, 918
 for money, 916
 for services or to pay debts, 917
 stock without full payment, 901
 knowledge of creditor, effect of, 912
 liability for, 900
 limitations, 940
 accrual of action, 944
 statute of, 945
 mining corporations, 909
 offsets, 942
 original subscribers, liability 920
 persons liable, 920
 insolvent transferee, 927
 original subscribers, 920
 record holder, 921
 transferee, 922
 watered stock, 924
 proof of participation in fraud or guilty knowledge, 925
 property, issue of stock for, 913
 valuation of, 914
 recovery by creditor, 939
 remedy of creditor in general, 932
 trust fund doctrine, 908
 validity and effect that stock is fully paid, 905
 Period of existence, 650
 Person, corporation as, 581
 Place of business, 629, 690
 change of, 694
 Pleading, actions by and against corporations (in vol. 7)
 admissions of corporate existence, 671
 denial of corporate existence, 667
 existence of corporation, 664
 misnomer, 675
 taking advantage of corporate incapacity, 666
 Pledge of stock, 816
 Principal place of business, 629, 690-694

CORPORATIONS—Continued

Private corporation, 605
 Powers of corporations (in vol. 7)
 Promoters, 695
 enforcement of liability, 702
 fiduciary relation and duty, 696
 fraud, liability for, 701
 liability of corporation, 704
 limitation and laches, 703
 ratification of agreement, 705
 sales by owner, 700
 to corporation, 699
 secret profits, 697
 stockholders protected, 698
 Proof of corporate existence, 667-674
 Property, power with reference to (in vol. 7)
 transfer or lease as a whole (in vol. 7)
 Public corporation, 605
 Purposes, articles of incorporation, 628
 Quasi-public corporation, 605
 Quo warranto proceedings (in vol. 7)
 Quorum, see Directors
 Real property, power with reference to (in vol. 7)
 Receivers (in vol. 7)
 Reclamation company, 606
 Recognition by act of legislature, 613
 Records, 721
 authentication, 729
 evidence, effect of records as, 724
 minutes, 726
 best evidence rule, 729
 parol evidence rule, 728
 proof of action not recorded in, 726
 production of, 729
 proof by copy, 731
 stock records required to be kept, 723
 Reduction of capital, see Capital Stock
 Reincorporation, 597, 598
 extent of liability of new corporation, 600
 Reports, officers' liability with respect to (in vol. 7)
 Residence, 690, 692
 Sale of stock, see Payment for Stock; Subscriptions to Stock
 School district, 607
 Scope of article, 576

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued

- Seal, 684
 - authority to affix, 689
 - effect of, 686-688
 - necessity for, 685
 - proof of, 688
- Shares, see Assessments; Capital Stock; Payment for Stock; Subscription to Stock; Stockholders; Stockholders' Liability; Transfer of Stock
- Sole corporation, 603
- Special act, creation by, 610, 611, 612
- Special benefits, conferring, 616
- State, power of over corporation, 584
- Stock, assessments on, see Assessments on Stock
 - dealing in by corporation (in vol. 7)
 - see Capital Stock; Payment for Stock; Subscriptions to Stock; Transfer of Stock.
- Stock dividends, 856
- Stockholders, 828
 - see Payment for Stock; Stockholders' Liability; Subscriptions to Stock; Transfer of Stock
 - acting for corporation, 838
 - actions on behalf of corporation, 862
 - cases in which relief may be given, 863
 - demand on corporation and refusal, 867
 - intervention where corporation neglects rights, 869
 - parties plaintiff, 871
 - persons who may sue, 870
 - stockholder as trustee for purposes of suit, 866
 - acts binding corporation as binding stockholders also, 839
 - contractual nature of relation, 829
 - corporate causes of action, 864
 - corporations as, 828
 - dealings with corporation, 837
 - dividends, see Dividends
 - enforcement of rights, 841
 - excusal of demand, 868
 - inspection, 841
 - enforcement of law, 846
 - nature and extent of right, 842

CORPORATIONS—Continued

- Stockholders—Continued
 - inspection,
 - persons who may exercise right, 846
 - reasons for permitting, 843
 - records or property, 841
 - interest as disqualifying, 830
 - interest in corporation, 834
 - liability, see Stockholders' Liability
 - limitation of, 873
 - majority, act of binding minority, 840
 - meetings, see Meetings and Elections
 - mining corporations, attacking validity of transaction, 851
 - ratification of transactions, 848
 - motive or purpose, 845
 - parties defendant, 872
 - persons who may be, 828
 - property, 845
 - of corporation, rights in, 834
 - real property transactions, ratification of, 848
 - relation of, 828
 - relations inter sese, 332
 - rights of, 828
 - in general, 834
 - suit by, see Actions, supra
 - termination of relation, 833
- Stockholders' liability, 982
 - actions, 1025
 - accrual of liability, 1011
 - assignee's right, 1026
 - corporations as stockholders, 1010
 - creditor's right, 1026
 - evidence as to who are stockholders, 1033
 - judgment against corporation as evidence, 1031
 - joinder of parties and causes, 1028
 - jurisdiction, 1029
 - legatces, 1007
 - pleading and proof, 1030
 - security given by corporation, effect of, 1032
 - venue, 1029
- applicability to all corporations, 986
- assessments, see Assessments on Stock
- basis of, 982
- code provisions, 983, 985

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued

Stockholders' liability — Continued
 constitutional provisions, 983
 contractual liability, 992
 contribution, right to, 1036
 creditor's suit on subscription, liability, see **Payment for Stock**
 declaration to do business in California, absence of, 989
 direct and primary, 995
 discharge by payment, 1033
 estates, 1007
 estoppel, 1006
 excuse of stockholder appearing on books, 1006
 foreign corporations, 987, 989
 heirs, 1007
 kinds of obligations, 990
 limitation, 1011
 application of payment to debts, 1024
 application of statute, 1012
 breach of covenants in lease, 1022
 creation of right of surety or guarantor, 1021
 effect of extinguishment of contract, 1020
 effect of judgment against corporation, 1018
 effect of note or account stated, 1017
 liability created by law, 1013
 miscellaneous liabilities, 1024
 time of incurring as time of creation, 1014
 unilateral contracts, 1019
 measure of, 998
 nature of liability, 991
 owner not of record, 1004
 partnership liability, comparison with, 994
 payment, discharge by, 1033
 for stock subscribed, see **Payment for Stock**
 persons liable, 1003
 primary, 995
 proportion, 999
 reimbursement, right to, 1036
 representative capacity, holding stock in, 1008, 1009
 separate and distinct from corporate liability, 997
 stockholders appearing as such on books, 1005
 subscribed stock as basis, 1001

CORPORATIONS—Continued

Stockholders' liability — Continued
 time of stockholding as test, 1002
 transfer of stock, effect of, 1035
 waiver of liability by creditor, 1038
Subscriptions to stock, 758
 blue sky law, 778
 sale of interest in voluntary trust, 781
 validity of unauthorized subscription and issue, 780
 cancellation, 776
 conditional subscriptions, 764
 amounts subscribed, 766
 corporate purpose, 765
 materiality of subscriptions, 767
 performance of conditions, 767
 repurchase of stock, agreement for, 767
 waiver of conditions, 769
 construction of, 760
 contract, character of, 758
 corporate securities act, 778
 corporations subscribing, 759
 enforcement of preincorporation subscriptions, 762
 fraud, 770
 fraudulent representations, 770
 remedies, 772
 rescission, 772
 after insolvency, 775
 restoration of value received, 773
 subscription for sale induced by, 770
 waiver of right to rescission, 774
 general considerations, 758
 incorporation, nature of agreement prior to, 761
 original issue, right to, 763
 payment of subscription, see **Payment for Stock**
 persons who may subscribe, 759
 preincorporation subscriptions, 761, 762
 signing articles, necessity for, 762
 withdrawal, 776
Survey of law, 578
Taxation (in vol. 7)
Term of existence, 630
Torts, liability for (in vol. 7)

A more complete index of the entire article on Corporations is contained in Vol. 7.

[The numbers in this Index refer to pages]

CORPORATIONS—Continued

Transfer of stock, 782
 action to compel, 800
 adverse claim as ground for refusing, 798
 agent, 788
 apparent ownership, 805
 title passed by, 808
 appurtenance to land, 812
 attachment, levy of, 809
 mode of attaching, 810
 attorney, 788
 authority, demand in evidence of, 796
 books, right to transfer or entry on, 794
 compelling transfer, 800
 conversion by refusal to transfer, 801
 delay in making, 797
 demand for transfer, 795
 delivery of certificate, 791, 792
 equitable action to compel, 800
 execution, levy of, 809, 811
 executors or administrators, 787
 indorsement, 791
 irregular or unauthorized transfer on books, 805
 land, stock appurtenant to, 812
 transfer of title to stock with, 813
 liens as ground for refusing, 799
 lost certificates, title, 786
 mandamus to compel, 803
 married women, 787
 methods of transfer, 793
 mode of transfer, 790
 mortgage of shares, 815
 non-negotiability of certificates, 785

CORPORATIONS—Continued

Transfer of stock—Continued
 nonresident owners, 789
 persons who may transfer, 787
 pledge, 816
 books, right to have pledge entered on, 818
 distinguished from sale, 816
 penalty for refusal, 804
 rights and liabilities, 817
 possession, continuing, 792
 power of disposition, 805
 refusal to transfer, 795
 as conversion, 801
 right to transfer, 784
 sales, certificates, title, 786
 statute, purpose of, 783
 statutory provisions, 782
 thief, title of, 786
 "trustee," use of word, 807
 unregistered transfer, 820
 effect of, 820
 as between corporations and parties, 822
 passage of title between parties, 821
 priority of attaching creditor before sales, 826
 purchaser at sheriff's sale, 824
 rights between transferor and transferee, 822
 subsequent bona fide transferee of registered holders, 823
 Trust, voluntary, 781
 Trustee, see Directors
 Ultra vires acts (in vol. 7)
 Venue of actions against corporations (in vol. 7)
 Visitation, 588
 Winding up affairs (in vol. 7)

A more complete index of the entire article on Corporations is contained in Vol. 7.

